

Freedom of Information Act 2000

Decision notice

Date: 15 November 2016

Public Authority: Sunderland City Council

Address: Civic Centre
PO Box 100
Sunderland
SR2 7DN

Decision (including any steps ordered)

1. The complainant requested minutes from the Corporate Human Resources Committee of Sunderland City Council (the Council) in relation to the recent departure of its former Chief Executive – Dr David Smith. The Council refused the request under section 40(2) of the Freedom of Information Act 2000 (the Act) as the information was third party personal data and disclosure would breach the Data Protection Act.
2. The Commissioner's decision is that the Council was correct to refuse the request under section 40(2) of the Act. No steps are required.

Request and response

3. On 8 February 2016, the complainant wrote to the Council and requested information in the following terms:

"I am requesting a printed copy of the unredacted minutes of the Corporate Human Resources Committee convened to discuss and approve the severance package of the former Chief Executive Mr David Smith."¹

¹ Dr Smith resigned from his post as Chief Executive of the Council in August 2015.

4. The Council responded on 7 March 2016. It stated that the information was exempt under section 40(2) of the Act. It also stated that disclosure was prohibited under the Local Government Act 1972 (LGA).
5. The complainant requested an internal review. The Council wrote to the complainant on 31 March 2016. It provided further detail on the specific sections of the LGA that prohibited disclosure, and confirmed that it was maintaining its refusal of the request under section 40(2) of the Act.

Scope of the case

6. During the course of the Commissioner's investigation the Council confirmed that it was no longer relying on any exemption within the LGA to refuse the request under the Act. This would potentially be permitted under section 44 of the Act, which allows for statutory prohibition of requests where other legislation bars disclosure.
7. In the Council's submissions it confirmed that it was relying on section 40(2) for the information in its entirety. It also stated that certain parts of the information were refused under section 42(1) of the Act as it was subject to legal professional privilege, and that the balance of the public interest favoured maintaining the exemption.
8. The Commissioner considers the scope of the case to be whether section 40(2) of the Act applies to the information. Should she find that section 40(2) does not prohibit disclosure she will consider the information withheld under section 42(1) of the Act.

Reasons for decision

Section 40(2) – third party personal data

9. Section 40(2) of the Act states that:
 - "(2) 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) [requester's own personal data], and*
 - (b) either the first or the second condition below is satisfied.*
 - (3) 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,"

10. The Commissioner has considered the most relevant data protection principle, which in this case is the first data protection principle. 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."

11. In order to reach her decision, the Commissioner will need to determine whose personal data comes within the scope of the request. She will then go on to determine whether it is fair to process the personal data – i.e. disclose it into the public domain. Should the Commissioner find that it is fair to process the personal data she will go onto to consider whether any of the conditions from Schedule 2 of the Data Protection Act 1998 (DPA) can be met.

Is the withheld information personal data?

12. Personal data is defined in the DPA as information which relates to a living individual who can be identified from that data, or from that data along with any other information in the possession or is likely to come into the possession of the data controller. The definition also includes opinions expressed about the individual.
13. The withheld information is minutes of Council's Human Resources Committee discussing the severance package for the former Chief Executive Officer – Dr David Smith. The information is specifically about Dr Smith and he can be clearly identified from it. Therefore the Commissioner considers the information to be personal data.

Is it fair to process the personal data?

14. In considering whether it is fair to process the personal data the Commissioner has considered the following:
- The nature of the information

- The consequences of disclosure
- The reasonable expectations of the individuals
- Balancing rights of the individual against any legitimate interest in disclosure of the information

Nature of the information

15. The Council argued that the information related to Dr Smith's private life because it relates to his departure from the Council, as opposed to it relating to his professional life. Information relating to an individual's personal life carries greater protection than information relating to their professional life.
16. The Commissioner disagrees with the Council's argument, as the information relates to Dr Smith's professional life. Whilst the ending of his employment with the Council is likely to have implications for his personal life, the nature of the information is strictly about his professional relationship with the Council.

Consequences of disclosure

17. The Council argued to the Commissioner that disclosure would have an adverse effect on the minds of current and future employees who entered into severance agreements, as it would be difficult to confirm that the Council could withhold information and thus damage trust in the agreement process. The Commissioner has not considered whether this argument has merit, as her decision is only about whether it is fair to process Dr Smith's personal data; any discussions about other hypothetical future agreements cannot be accepted as they do not relate to this.
18. As noted above, the withheld information concerns Dr Smith's professional relationship with the Council, and more specifically, the termination of that relationship. Nevertheless, the Commissioner accepts that disclosure of the withheld information would still be likely to result in some infringement of Dr Smith's privacy. This is because it discusses matters relating to his employment by the Council, and more specifically, the terms of his departure following his decision to tender his resignation. The Commissioner considers it important to recognise that even for the most senior officials in public authorities, disclosure of such information could still potentially cause them harm or distress, and as a result lead to an infringement their privacy. For the reasons outlined above, the Commissioner is persuaded that this is such scenario.

Reasonable expectations of the data subjects

19. The Council provided the Commissioner with extracts from the negotiated agreement it had with Dr Smith, which was designed to limit what information could be made public by either party. The Council states that this agreement gives Dr Smith a reasonable expectation that the Council would not make certain details public about the agreement.
20. The Commissioner considers that this argument has merit, but not that it is conclusive. From looking at the agreement it clearly states that the agreement does not prohibit any release of information to which the Council is legally obliged to make. In the Commissioner's view, this would apply to disclosure under the Act in response to a request for information. The expectation has to be reasonable under the circumstances, and Dr Smith will be perfectly aware about the public interest surrounding his resignation.
21. The Council confirmed to the Commissioner that Dr Smith had been consulted to see if he would consent to the disclosure of the personal data, and that Dr Smith confirmed that he had no expectation that this information would be made public. The Commissioner acknowledges the view of Dr Smith, but again this is not a conclusive argument that the exemption should be maintained.
22. Nevertheless, in the Commissioner's view, Dr Smith would have a reasonable expectation that his personal data would be withheld from disclosure in response to a request under the Act as there is precedent for similar information. The Commissioner has issued decisions on severance agreements for chief executives in local authorities, and there are several instances where the information has been withheld.²
23. The Council has argued that Dr Smith would have a legitimate expectation of privacy in this matter as disclosure may have a negative impact upon Dr Smith's private life or his future employment prospects. The Council has not provided much detail on this argument, but the Commissioner does accept that disclosure would have an impact upon Dr Smith's private life for reasons mentioned earlier. However, she has not accepted that disclosure would impact upon Dr Smith's future employment prospects. This

² For example: https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042128/fs_50530150.pdf

might well be true, but it is not been argued sufficiently in this instance and it is not self-evident from the requested information itself.

Balance of privacy rights against legitimate interest in disclosure

24. There is an inherent protection for third party personal data under section 40(2) of the Act. It needs to be demonstrated that there is a strong legitimate interest in disclosure relevant to the requested information in order to support overturning the refusal of the request.
25. The Commissioner notes the complainant's argument that Dr Smith resigned soon after the Council received a damning report from Ofsted into the Council's Children Services. Whilst this had been reported in the news at the time,³ there was no great detail on whether there was a link between the two events, or the reasons why Dr Smith chose to stand down.
26. The Commissioner cannot find evidence that evidence that the full cost of Dr Smith's severance package was available in the public domain, either through the Council's own announcements or through local media outlets. This would increase the support for disclosure of the information, as at the time of the request there had not been much transparency regarding the cost of the redundancy package to the Council. The Commissioner notes that the Council published the full amount in its accounts for 2015/16,⁴ as required by DCLG guidance, but at the time of the request this was yet to be published.
27. Further, the Council had been asked questions about how much the package would cost from a local Councillor, and the Council had refused to provide this information.⁵ Where a sum this size is being spent, there is a legitimate interest in improving public understanding of why the money had been spent.

³ For example: <http://www.sunderlandecho.com/news/sunderland-city-council-chief-executive-quits-175-000-a-year-top-job-1-7415045>

⁴ See page 93 of Statement of Accounts:
<http://www.sunderland.gov.uk/index.aspx?articleid=10346>

⁵ <http://www.sunderlandecho.com/news/golden-goodbye-row-sunderland-council-leader-refuses-to-reveal-pay-off-sum-for-242-000-a-year-chief-executive-1-7703098>

28. Similarly, the Council elected to decide the figure at a meeting of its Corporate Human Resources Committee, rather than by the full Council as recommended within DCLG guidance. This would increase the legitimate interest in transparency, as there had not been the recommended scrutiny for the severance package from the Council's own elected officials.
29. However, in the Commissioner's view the requested information does little to address the concerns that support these legitimate interests. The withheld information does not explain the reasons why Dr Smith resigned, such as whether it was related to the report from Ofsted. Nor does the information explain how the redundancy figure was determined, aside from references to broad calculations that were predetermined from the Council's established policy on termination of employment. The detail of how this figure was reached is only referred to through mention of a report tabled by a member of the Committee, but the report itself was not contained in the minutes themselves and so does not come within the scope of the request.

Conclusion

30. The Commissioner does not dispute that there is a strong public interest in information relating to Dr Smith's resignation from the Council. However, in this instance she considers that the requested information does not provide much to address any pressing need for transparency and accountability in this matter. Without this connection, there is not sufficient legitimate interest to justify the intrusion into Dr Smith's privacy.
31. The Commissioner's decision is that the Council is entitled to refuse the request under section 40(2) of the Act. As the Commissioner has found that section 40(2) applies she has not gone on to consider section 42(1). No steps are required.

Right of appeal

32. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

33. 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.
34. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF