

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2011

Public Authority: Oldham Borough Council
Address: Civic Centre
West Street
Oldham
Lancashire
OL1 1UG

Decision

1. The complainant has requested information about the annual figures for current and former employees of the public authority who have signed compromise agreements in specified circumstances, and information about any provisions whereby the employee concerned agrees to forgo their rights to submit requests for information under either FOIA or the Data Protection Act 1998 (DPA). Elements of the request were refused on the grounds that the requested information is personal data, and disclosure would breach the data protection principles.
2. The Commissioner's decision is that the information which is being withheld is personal data and Oldham Borough Council correctly refused the request.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 5 January 2011, the complainant wrote to Oldham Borough Council (the council) and requested information in the following terms¹:
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¹ See

http://www.whatdotheyknow.com/request/total_annual_figures_for_comprom_212#comment-19191

"Please supply Annual totals for the following:

As far as records go back, the annual figures for the total of current employees / ex-employees (including teaching staff) of the Council who have signed compromise agreements directly related to the resolving of dispute(s) / grievance(s) / internal and external investigation(s) / whistleblowing incident(s).

In addition to this, annual figures for the number of current employees / ex-employees (including teaching staff) who have agreed, following the matter being raised and made conditional as part of a compromise agreement drawn up by the body acting as the Council's legal team, to sign and forgo their right to approach the council in the future with Freedom of Information and/or DPA Subject Access requests under the relevant Acts.

Please provide the figures in the following format e.g. 2006 - 2; 2007 - 4; 2008 - 0; 2010 - 6; etc.

Please note that I do not seek or require any personal information such as names and addresses – only the total figures for each subject area."

5. The council responded on 31 January 2011. It stated that:

"The numbers/statistics represent individuals personal data which are exempt from disclosure under the Freedom of Information Act 2000 Section 40, personal data. This exemption allows the withholding of personal data if the data protection principles would be breached by its disclosure.

[...] This request cannot be fulfilled without prejudice to the individuals rights and freedoms, in particular their right to privacy and hence a condition in schedule 2 cannot be met.

Consequently, as Principle 1 of the Data Protection Act 1998 cannot be met, the exemption under the Freedom of Information Act 2000 is engaged."

6. The complainant subsequently refined his request to exclude certain common circumstances in which compromise agreements are used, specifically:

- TUPE² situations
 - purely redundancy situations
 - equal pay claims
 - purely PILON³ situations
 - COT3⁴ agreements (where Tribunal proceedings may or may not have been initiated)
7. Following an internal review the council wrote to the complainant on 20 June 2011. It explained that it continued to rely on the exemption for personal data previously cited on the grounds that, due to the low numbers of agreements which would be disclosed, this would enable the individuals affected to be identified in some circumstances, for example by family members or other members of staff, and that therefore the statistical data could not be sufficiently 'depersonalised' to render it properly anonymous. Therefore it remains personal data and cannot be disclosed.
8. In subsequent correspondence with the complainant, the council confirmed that its compromise agreement does not make use of 'gagging clauses' – the complainant's term for a provision requiring the employee to forgo their access rights under FOIA or DPA.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He argued that the statistical data he had requested was not personal data and the council was wrong to withhold it.
10. The Commissioner considers the scope of his investigation is to establish whether the requested information is personal data and, if so, whether it was correctly withheld under the provisions of section 40(2) of FOIA, on the grounds that disclosure would contravene any of the data protection principles.

² A reference to the Transfer of Undertakings (Protection of Employment) Regulations 2006

³ Pay in lieu of notice

⁴ An agreement negotiated by ACAS, the Advisory, Conciliation and Arbitration Service

Reasons for decision

11. Section 40 of FOIA states:

Personal information.

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.”

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

12. The Commissioner considers that, for the purposes of FOIA, the applicable data protection principle is the first, which states:

“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”

13. Similarly, the applicable Schedule 2 condition is the sixth:

Condition 6 (1) provides that –

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.

Is the requested information personal data?

14. The council gives its view that for each year requested, where it holds data the numbers of cases are small, so that the statistics, when considered in light of press coverage of certain events well-publicised in the local media, and other common knowledge within the community, or with colleagues, would make it likely that positive identifications of individuals could be made. For this reason, it argues, the statistical information is personal data.
15. If it can be related to an identifiable living individual by association with other information which is already in the public domain to any extent, the statistical information will remain personal data, even if it appears to be anonymised by virtue of being simply numbers.
16. In this case, the council has provided the Commissioner with the raw statistics, broken down into the years 2008/09; 2009/10 and 2010/11 under each of the four categories of dispute listed in the request. The council has also drawn the Commissioner's attention to various local press reports about events during the same period which, it observes, describe situations which have similarities to the sort of scenarios described in the request. Disclosure may therefore lead people to draw inferences from their knowledge of what was reported in the press. It argues that there would be a strong likelihood of assumptions being made about identifiable individuals.
17. It also argues that links to individuals might be drawn from the data through 'corroborating information' known through:
 - workplace knowledge of former colleagues and staff; or
 - local knowledge from family and friends, or other third parties who might have had dealings with any of the individuals to whom the data relate.
18. The Commissioner recognises that if any of the withheld statistical data were to relate to schools, there would be a substantial number of parents who would be likely to be aware of events at that school and who might therefore link the withheld information to identifiable individuals. This therefore considerably increases the pool of people, beyond immediate family or former colleagues, who might possess 'corroborating information' and which, when linked to the withheld information could enable a link to an identifiable individual to be made
19. The Commissioner recognises that the argument here is that disclosure of the statistical information may be combined with other information, already in the public domain, which would therefore enable a picture to emerge, rather like building a mosaic from apparently unrelated pieces.

20. In some cases, any such 'mosaic' argument relies on the possibility that such links can be made⁵. This case is perhaps more unusual in that there is already clear evidence of information widely available in the public domain, which makes it significantly more likely that individuals would be identified from the disclosed statistical data.
21. The council also argues that if inferences are drawn about certain individuals, as a result of the information already in the public domain via the media, then that might enable those numbers to be deducted from the annual totals in the withheld information. This further reduces the numbers in the raw statistical data for the period, which increases the likelihood that any remaining individuals could be identified from other information in the public domain, for example by former colleagues, family or friends from workplace or personal knowledge.
22. The Commissioner is satisfied that the withheld statistical information is personal data in the circumstances. It is therefore necessary to consider whether disclosure of personal data would contravene any of the data protection principles, specifically the first, noted at paragraph 12 above. While it is not argued that disclosure would be unlawful, it is necessary to consider whether it would be unfair to disclose the information.

Fairness

23. The Commissioner recognises the council's argument that it is standard practice for compromise agreements to contain confidentiality clauses requiring both parties to refrain from publicising details of the terms of the agreement reached. Therefore, there is a clear expectation on the part of any affected individuals that information relating to compromise agreements will be treated in strict confidence. This gives rise to a reasonable expectation on the part of any affected employees that the public authority will not disclose information relating to compromise agreements which will connect to an individual. This is well-understood and accepted in previous decisions by the Commissioner.
24. The Commissioner notes that certain individuals have been named in media reports, or are otherwise identifiable from reference to the positions they held within the public authority at the time of the reports.

⁵ For example, the Commissioner's decision notice in case reference FS50321032, subsequently upheld by the First Tier Tribunal in case reference EA/2011/0074, see paragraphs 30-34:
<http://www.informationtribunal.gov.uk/DBFiles/Decision/i589/20110907%20%20Decision%20%20EA20110073-74.pdf>

On the one hand, it may be argued that, irrespective of the considerations in paragraph 23, above, as the matter has already reached the public domain to some degree it would not be unfair to disclose the information in the present circumstances.

25. However, the Commissioner recognises that at least some of these media reports are now two or three years old and may be said to have faded from the public eye to some degree. Therefore, any new disclosure which serves to rekindle interest in those older reports would clearly be unwelcome to the individuals affected. Furthermore, some of the reports are more recent and disclosure might also serve to prolong the exposure in the public domain beyond the point at which it might normally fade from view.
26. The council also reminded the Commissioner that he has recently served decision notices about requests for information which it had received, and which related directly to certain of the matters reported in the press. It is therefore reasonable to note that those matters have already stimulated public engagement with the council, and to conclude that further public attention would be unwelcome on the part of the individuals.
27. These arguments are necessarily speculative, to some degree, as to the effect they would have on the identifiable individuals, however the Commissioner considers it reasonable to conclude that most people would be likely to suffer harm as a result of significant and stressful personal events, of the sort envisaged by the request, being aired in public. He is also mindful that an unknown proportion of the individuals who make up the statistical information have not previously found themselves in the public eye, and drawing attention to circumstances which might lead to their identification would clearly be unfair.
28. Finally, one factor which might mitigate against the arguments above would be if there are circumstances where disclosure could be in the public interest, for example, facilitating public scrutiny of wrongdoing by an individual in public office. In this case, however, the complainant is not seeking to uncover any wrongdoing, his request is of a more general nature, having been more widely submitted to a substantial number of public authorities. While he may have a legitimate interest in requesting such information, in the terms expressed at paragraph 13 above, that legitimate interest is largely of an academic nature and is not seeking to uncover specific wrongdoing or other matters which justify exposure in the public domain. Therefore, disclosure is not sufficiently important that it should override any risk of prejudice to the rights and freedoms or legitimate interests of the individuals.

29. The Commissioner concludes that it would be unfair to disclose the requested personal data, in the terms expressed by the first data protection principle, and therefore the requested information was correctly withheld.

Other matters

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible.

While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 80 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

30. 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

31. 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.
32. 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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