

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2013

Public Authority: Rotherham Metropolitan Borough Council

Address: Riverside House
Main Street
Rotherham
S60 1 AE

Decision (including any steps ordered)

1. The complainant requested information relating to the departure of Rotherham Metropolitan Borough Council's former Strategic Director of Resources, Mr Andrew Bedford.
2. The Commissioner's decision is that the council has properly applied Section 40(2) to all of the information sought by the complaint with the exception of the payments the council made to Mr Bedford.
3. The Commissioner has decided that the council incorrectly applied Section 40(2) to the information it holds about the payments it made to Mr Bedford on leaving the council's employment. The council has now disclosed details of these payments in its statement of accounts. The council is therefore not required to comply with the complainant's request.

Request and response

4. On 21 January 2013, the complainant wrote to Rotherham Metropolitan Borough Council ("the council") and requested information in the following terms:

"Further to my call, I wondered if you had got anywhere with providing the payments, if any, or other remuneration Mr Bedford received when leaving the council. I would also like to know who carried out the investigation, any payments that were made to the individual carrying out the investigation and other payments associated with Mr Bedford's suspension, investigation and departure. This might include, but not exclusively, any legal costs.

Additionally, I would like to know what the outcome of any investigation was and whether the council has reported Mr Bedford's conduct to any outside body. Finally, I would like to know if any reports have been prepared for councillors on Mr Bedford's departure and would like the information held in them."

5. The council responded on to the complainant's request on 19 February. For the purpose of its response the council itemised the complainant's request as follows:
 - 1) Provide details of payments, if any, or other remuneration Mr Bedford received when leaving the council.
 - 2) Who carried out the investigation?
 - 3) What payments were made to the individual carrying out the investigation?
 - 4) Other payments associated with Mr Bedford's suspension, investigation and departure. This might include, but not exclusively, any legal costs.
 - 5) I would like to know what the outcome of any investigation was and whether the council has reported Mr Bedford's conduct to any outside body.
 - 6) I would like to know if any reports have been prepared for councillors on Mr Bradford's departure and would like the information held in them.

The council refused to supply information it held in respect of items 1, 4 5 and 6 in reliance of Section 40(2) of the Act. The council informed the complainant that the information he seeks is the personal data of a third party and that disclosure would contravene the first data protection principle – the requirement that personal data should be processed fairly and lawfully. The council also drew the complainant's attention to a confidentiality agreement it had entered into with Mr Bedford in respect of his leaving the council's employment and to the council' general duty of confidence owed to its employees and former employees.

The council informed the complainant that the investigation of this matter – item 2, was conducted by a designated independent person ("a DIP") in accordance with the Local Government Standing Orders (England) Regulation 2001.

The council disclosed the cost of the investigation – item 3, informing the complainant that this was £5259.

6. On 19 February the complainant wrote to the council and asked for a review of its response to his request.
7. Following an internal review the council wrote to the complainant on 2 April 2013. The council confirmed its position that it would not be providing the information the complainant had requested. The council asserted that it would be unlawful to release any information which is subject to its confidentiality agreement. It maintained its position that an employee, or ex-employee, would have a reasonable expectation that specific details of a personnel matter would not be made in response to a freedom of information request.
8. The council also confirmed that it had asked the DIP whether he/she would consent to the disclosure of his/her identity. The council informed the complainant that the DIP had refused consent and had expressed his/her expectation that the information would not be made public. The council therefore believed that disclosure of this information would contravene the first data protection principle. The council did however confirm that the individual was an independent person, appointed in accordance with the relevant legislation.

Scope of the case

9. The complainant contacted the Commissioner on 3 April 2013 to complain about the way his request for information had been handled. The complainant stated that he was particularly concerned about the withholding of pay-off information, to which he understood Section 40 did not apply.
10. The Commissioner has investigated whether the council was correct in its application of Section 40(2) to the information withheld in respect of items 1, 2, 4, 5 and 6. He has not investigated item 3 as this information was disclosed to the complainant in the council's initial response.

Reasons for decision

Section 40 – Personal information

11. The council has relied on section 40(2) of the FOIA to withhold information relevant to items 1, 2, 4, 5 and 6. Section 40(2) provides an exemption from disclosure, for information which is the personal data of any third party and where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 ("the DPA") or section 10 of that Act.
12. In order to rely on the exemption provided by section 40, the information being sought must constitute personal data as defined by the DPA. 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 or, 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 to the individual.'
13. The Commissioner is satisfied that the information sought by the complainant is the personal data of Mr Bedford – items 1, 4, 5 and 6, and of the DIP – item 2.
14. The Commissioner must now consider whether disclosure of the requested information would breach any of the data protection principles contained in Schedule 1 of the DPA. He considers that the first data protection principle is the one most relevant in this case.

The first data protection principle

15. The first data protection principle has two components:
 1. Personal data must be processed fairly and lawfully, and
 2. Personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.
16. The Council assert that an employee, or ex-employee, would have a reasonable expectation that specific details of a personnel matter would

not be made available to the public. It also informed the Commissioner that it has entered into a confidential agreement with Mr Bedford. This would give rise to him having a reasonable expectation that the details of that agreement would be kept confidential and that disclosure would be unwarranted. Additionally, the council believe that a confidentiality clause in the agreement constitutes an enforceable contractual term.

17. In the Commissioner's view, the right to access official information and the right to agree terms when an employee leaves a public authority's employment are not mutually exclusive. A balance has to be struck between the public authority's obligation to be transparent and accountable for its decisions, including the expenditure of public money, with its duty to respect its employee's reasonable expectation of privacy.
18. The Commissioner has considered separately what he considers would be Mr Bedford's and the DIP's reasonable expectations about the release of the information requested by the complainant.

Items 1, 4, 5 and 6 – Mr Bedford's personal data

19. The Commissioner considers that Mr Bedford would have different expectations about the disclosure of details of the severance payment he received and any other information held by the council in respect of his leaving its employment. He has therefore considered disclosure of the severance payment details separately from the analysis about the remainder of the information.
20. The Commissioner recognises that there is a widespread and general expectation that the details of a person's employment should be considered confidential. However he also considers that the seniority of the employee should be taken into account when personal data is requested under the Freedom of Information Act.
21. In his view, the Commissioner considers that the more senior a person is it will be less likely that to disclose information about him or her, acting in an official capacity, would be unfair.
22. Mr Bedford held the position of Strategic Director of Resources within the council and as such was a senior council employee. It is commonly held that the employment details of similarly placed individuals are routinely put into the public domain. In this instance the request information relates to any payments/remuneration Mr Bedford received when leaving the council and also information which resulted from an investigation.
23. In the Commissioner's view, the information which flowed from the investigation consists of material which is not usually available to the public.

24. The expectation of privacy in respect of the termination of a person's employment has been affirmed in the Tribunal case of *Trago Mills (South Devon) limited v Information Commissioner and Teignbridge District Council*¹. The Tribunal upheld the Commissioner's decision that disclosure of the details of a severance agreement would be unfair and therefore contravene the first data protection principle. The Tribunal stated that:

"Even without an express confidentiality provision, an individual would have a reasonable expectation that the terms on which his employment came to an end would be treated as confidential. The question we have to consider is, not whether X's severance package was a private transaction (it clearly was), but whether the factors in favour of disclosure would not have represented an unwarranted interference with that right."

25. The Commissioner has considered the seniority of Mr Bedford within the council. He recognises that even amongst senior members of staff there would still be a high expectation of privacy between the employee and his employer in respect of disciplinary matters. He considers that the disclosure of the 'investigation' information would represent a significant invasion of Mr Bedford's privacy. For this reason the Commissioner agrees with the council that the disclosure of the 'investigation' information could result in damage and distress to Mr Bedford and would be unfair.

26. The Commissioner notes that the agreement entered into by the council and Mr Bedford. This agreement includes provisions relating to the obligation of both parties to keep the circumstances of Mr Bedford's leaving the council's employment confidential and also refers to any payment made to Mr Bedford's legal advisor. The Commissioner is satisfied that this agreement would also set a reasonable expectation that no further information would be disclosed to the public.

27. The Commissioner has found no evidence to suggest that Mr Bedford has proactively sought to put details of his departure from the council into the public domain. If he had sought to gain publicity about the termination of his employment, it may have been possible to argue that he would not have a reasonable expectation that the investigation information would remain private. This is not the case in this instance.

¹ Appeal number EA/2012/0028

The 'severance payment'

28. The Commissioner's guidance on requests for personal data about public sector employees² states that:

"Employees' expectations as to what information will be released will have to take account of statutory or other requirements to publish information. For example, the Accounts and Audit Amendment no 2) (England) Regulations 2009 require local authorities, fire and police authorities and certain other bodies in England to publish in their annual accounts the amounts paid to employees in connection with the termination of their employment, if their total remuneration is over £50,000. These amounts are published by job title if the total remuneration is between £50,000 and £150,000 and by name if it is over £150,000. However, this legislation only directly affects reasonable expectations regarding the actual amounts of money paid out, and only for those particular authorities. Reasonable expectations in other contexts may differ, but it should be recognised that there is an increasing public expectation of transparency regarding the expenditure of public money and the performance of public authorities. This is especially the case if there is any evidence of mismanagement by senior staff in a public authority."

29. Mr Bedford's position within the council was such that details of any severance payment he received are subject to the requirements of the regulations stated above.

30. The Commissioner therefore considers that Mr Bedford would have a reasonable expectation that the payments he received would be disclosed and properly accounted for. He considers that disclosure of the severance payments would be fair and lawful and would satisfy the sixth condition for processing personal data in Schedule 2 of the DPA:

"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."

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http://www.ico.org.uk/~//media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

31. The Commissioner notes that the council refused to disclose to the complainant information relating to 'payments and other remuneration Mr Bedford received when leaving the council' – item 1, at the time he made his request. This information was later disclosed in by the council in its statement of accounts 2012 – 13³, under a reference relating to Mr Bedford's former job title.
32. The Commissioner considers that the disclosure of the payments made to Mr Bedford would be fair and lawful under this Act, and is required under the Accounts and Audit (Amendment no 2) (England) Regulations 2009. He has therefore determined that the council was incorrectly relied on Section 40(2) to withhold this information.

Item 2 – the identity of the Designated Independent Person ("the DIP")

33. The council informed the Commissioner that it sought the views of the DIP in respect of the disclosure of the DIP's identity at the time it carried out its internal review.
34. The DIP confirmed to the council his/her expectation that the information is confidential and that the details would not be made public. The DIP refused his/her consent for the council to disclose details of his/her identity.
35. The council disclosed to the Commissioner the identity of DIP and the basis on which he/she was engaged.
36. The Commissioner has considered whether disclosure of the DIP's identity by the council would be fair. He has considered the DIP's reasonable expectations that his/her identity would be made public and in mindful of his/her refusal to consent to disclosure.
37. The Commissioner is satisfied that it would be unfair to the DIP for the council to disclose his/her identity. He is satisfied that the DIP was properly qualified and properly engaged to carry out the investigation of Mr Bedford.
38. For this reason the Commissioner has determined that the council was correct to rely on Section 40(2) to withhold the identity of the DIP.

³ http://www.rotherham.gov.uk/downloads/file/9312/statement_of_accounts_2012-13/10069 (at page 37)

39. Even if the Commissioner was to conclude that disclosure of the DIP's identity would be fair and lawful, the council would still be required to satisfy one of the conditions for processing personal data contained in Schedule 2 of the DPA. In this case condition 6 is again relevant.
40. The Commissioner has considered the requirements of condition 6 (paragraph 31 above). He cannot adduce any necessary legitimate interest for the public to be told the identity of the DIP which would not prejudice the rights to his/her privacy.
41. The Commissioner considers that disclosure of the DIP's identity could result in the DIP being approached and questioned about his/her investigation of Mr Bedford. He considers that such approaches would be unwarranted.

Right of appeal

42. 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

43. 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.
44. 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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