

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2016

Public Authority: Rutland County Council
Address: Catmose Park Road
Oakham
Rutland
LE15 6HP

Decision (including any steps ordered)

1. The complainant submitted an eight-part request for information about harassment and bullying complaints in the workplace. Rutland County Council (the 'Council') provided some information, but refused the remainder citing sections 40(2) of FOIA, personal information, and 12, the cost exclusion. The complainant was concerned only with the Council's reliance on section 40(2) which was applied to parts 2 to 6 of his request.
2. The Commissioner's decision is that the Council has incorrectly applied the exemption for personal data at section 40(2) of FOIA to parts 2 to 6 of the request, as the withheld information is sufficiently anonymised to take it out of the definition of personal data.
3. He therefore requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information as provided to the Commissioner for parts 2 to 6 of the request as set out in paragraph 5.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 November 2015 the complainant wrote to the Council and requested information in the following terms:

" This request is being made to make the public at large and people in each authority aware of which councils are the worst offenders or the better examples when it comes to bullying in the workplace. All councils have very similar anti-bullying / dignity at work policies, but there seems to be a difference in the level of bullying. This is intended to statistically show those differences.

1) How many employees of your authority have made an official complaint of harassment and bullying at work since the 1st April 2009?

2) How many of these complaints were upheld in favour of the complainant?

3) How many of those which were not upheld in favour of the complainant went on to Appeal?

4) How many of those that went to Appeal were found to favour the complainant?

5) How many complaints went on to an Employment Tribunal?

6) How many of these were found to uphold the complaint?

7) Out of how many of those allegations (the number given to question 1) did the complainant of bullying claim that the bullies were telling lies?

8) How many staff does your authority have and what is the current population within your authority's area?"

6. The Council responded on 23 November 2015 and answered parts 1 and 8 of the request. For parts 2, 3, 4, 5 and 6, it cited section 40(2), the exemption for personal information. It said it could not comply with part 7 because to do so would exceed the cost limit set out in section 12 of FOIA.
7. On 24 November 2015, the complainant contacted the Council because he was dissatisfied with its handling of question 2 in particular. The Council then issued a further response on 25 November 2015 in which it maintained that section 40(2) applies.

8. The complainant requested an internal review on 1 December 2015 which focussed on the Council's reliance on section 40(2). The Council provided its internal review on 10 December 2015 in which it maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 29 January 2016 to complain about the way his request for information had been handled.
10. After an exchange of correspondence the complainant told the Commissioner:

"...I can confirm that I am satisfied with the response to the rest of the questions outside of questions 2 to 6. In fact, I am most dissatisfied with [the Council's] responses to question 2, as well as their attitude to my review complaint".

11. The Council had cited section 12 in relation to part 7 and provided the information to parts 1 and 8 of the request. As the complainant has confirmed he is satisfied with the Council's handling of parts 1, 7 and 8 of the request, the Commissioner has considered only the Council's reliance on section 40(2) for parts 2 to 6 of the request.
12. In addition, the complainant raised some other issues as part of his complaint which are not section 50 FOIA issues; they have been considered in the 'Other matters' section at the end of this notice.
13. The Council has confirmed that there are eight individuals who have raised complaints which fall within the scope of the request.
14. The Commissioner has viewed the withheld information.

Reasons for decision

Section 40(2) – personal information – parts 2, 3, 4, 5 & 6 of request

15. Section 40(2) of the FOIA provides that information is exempt from disclosure if it 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.
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

Act 1998 (the 'DPA'). If it is not personal data then section 40 cannot apply.

17. 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 notes in this case that the Council considers that disclosure would breach the first data protection principle.

18. In order to rely on section 40(2) the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

" ...data which relate to a living individual who can be identified

a) From these 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 intention of the data controller or any other person in respect of the individual."

19. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

20. From the definition above, it follows that information or a combination of information, that does not relate to and identify an individual, is not personal data.

Is the disputed information personal data?

21. The first question for the Commissioner to consider is whether the requested information is personal data as defined in section 1 of the DPA.

22. The disputed information in this case is the further breakdown of the overall number of eight complaints which the Council confirmed were in the scope of the request. The primary consideration in the circumstances of this case is whether any employees are identifiable from the anonymised data, in conjunction with information already known or available to the public, including the complainant.

Complainant's arguments

23. The complainant argued that there: *"is no possibility for individuals to be identified here. I would like an answer to question 2 especially, for my table of results, how many out of the 8 alleged complainants"*.

Public authority's arguments

24. The Council is of the view that the disputed information refers to a very small number of individuals (ie eight) from a total of 460 employees.
25. The Council acknowledged that the request does not ask for individual staff names, rather it asks for numbers. The Council believes there is a risk that individuals may be identified because the numbers in the further breakdown are lower than four.
26. It argued that, in context, the Council is the smallest unitary authority in England and that there is a familiarity in the workplace which might not be encountered elsewhere. It said:

"Due to the locality and internal office infrastructure, it would be difficult to avoid identification of individuals if the mosaic effect was applied. The subject matter is contentious therefore the Council has taken the decision to protect its employees by applying what it believes are the appropriate exemptions."

Commissioner's assessment

27. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears truly anonymised.
28. The ICO's Code of Practice on Anonymisation¹ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that

¹ <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

29. In summary, the motivated intruder test is that if the risk of identification is "*reasonably likely*" the information should be regarded as personal data.
30. The Commissioner is mindful of the timeframe of the request, ie the information requested covers a period of 6.5 years. Having had the opportunity to review the withheld numbers, he accepts that some of the numbers within the scope of the request are low.
31. However, even where the number may be low, the Commissioner does not consider that this in itself means that the information is personal data.
32. The requested information in this case relates to the numbers of employees who have made an official complaint of harassment and bullying since April 2009. This figure has been provided. The complainant also requested the associated outcomes of those eight complaints further broken down by number - not individual employees' names or dates the complaints were submitted.
33. The time period involved would, in the Commissioner's view, lessen the likelihood of individuals being identified. This is because an individual would need to have a detailed knowledge of all the employees working at the Council over 6.5 years, together with details of the specific outcome of the eight complaints in order to be able to potentially identify any one individual. Additionally, there will have been a turnover of staff during that period and those who made complaints may therefore no longer be employees.
34. Whilst it is technically possible that individual employees within the Council may be able to identify themselves from the disclosure of the withheld information, because they complained of harassment and bullying during the period 1 April 2009 to 19 November 2015, the Commissioner is satisfied that those individuals would already know that information.
35. In light of the above, and having considered the withheld information, the Commissioner does not consider that any individual employee could be identified from the withheld information.
36. Consequently, he has decided that the withheld information does not constitute personal data and that the exemption in section 40(2) is not engaged.

Other matters

37. The complainant raised some issues which are not section 50 issues, so they have been considered here. He referred to the Council's handling of part 2 of his request, stating that the Council had not relied on section 40(2) until its second response. From the correspondence provided to the Commissioner, he has determined that in both responses (prior to the internal review) on 23 and 25 November 2015, the Council did stipulate that it was relying on section 40(2) for part 2.
38. Furthermore, the Council is permitted under FOIA to amend its position in relation to the request up to and including the internal review stage. The Commissioner also allows public authorities to alter their positions when reviewing their handling of requests in order to respond to his investigations.
39. Additionally, the complainant raised concerns about the way in which the Council had dealt with his internal review request. As the internal review is not a statutory requirement, and instead is recommended good practice, the Commissioner has considered it here.
40. His concern links to his view that the original refusal of his request may have been invalid because the Council had not cited section 40(2). This aspect has been dealt with above so the Commissioner does not intend to repeat it here.
41. The complainant was unhappy with the wording of the internal review, specifically the reviewing officer's reference to the matter being "concluded". What she actually wrote was as follows:
- "For my part I now consider this matter to be concluded, however, if you are dissatisfied with this decision you may request the Information Commissioner to investigate."*
42. The complainant said: *"...this seems to me to suggest that any further complaint is spurious or not worthy in some way and should not be pursued – a delicate way of putting some kind of moral pressure on the complainant to desist"*.
43. The Commissioner considers the wording of the reviewer to be entirely reasonable and it is standard practice for a public authority to conclude its handling of the request and to offer complainants the right to appeal to the Commissioner. He therefore finds no evidence to support the complainant's view.

Right of appeal

44. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

45. 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.
46. 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

Carolyn Howes
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