

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 January 2021

Public authority: Herefordshire Council

Address: Plough Lane
Hereford
HR4 0LE

Complainant: Mr Chris Bury

Address: chris [REDACTED]

Decision (including any steps ordered)

1. The complainant has requested information from the Council regarding registration of social workers. The Council refused to disclose some of the requested information, citing section 40(2) of the FOIA as a basis for non-disclosure.
2. The **Commissioner's decision** is that the Council has correctly applied section 40(2) of the FOIA to the requested information.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant wrote to the Council on 21 February 2019 and requested information in the following terms: -

"1. Between January 2016 and January 2019, how many qualified social workers employed by Herefordshire Council were a practising social worker before first being registered with the relevant authority (The HCPC)?
Please provide separate figures for Adults and Wellbeing Services and Children's Services.

It may be helpful for you to know I am aware of at least one instance, having evidence of such, where a Herefordshire Council Adults and Wellbeing social worker was practising without first being registered with The HCPC.

2. Of those individuals identified as an unregistered yet practising social worker by any member of the public or staff of Herefordshire Council, what action was taken by Herefordshire Council?

Please refer to The Care Standards Act 2000; denoting it is a criminal offence for a social worker to be practising without first being registered with The HCPC.

3. How many social workers are currently employed by Herefordshire Council in Adult Social Care (Adults and Wellbeing)?

4. How many social workers are currently employed by Herefordshire Council in Children's Social Care (Children's Services)?"

5. The Council responded to the complainant on 20 March 2019. The Council provided some of the requested information to the complainant and withheld the remainder, i.e. part 2 of the complainant's request, citing section 40(2) of the FOIA as a basis for non-disclosure.

6. On 28 March 2019, the complainant again wrote to the Council, seeking clarification as to its response to parts 1 and 2 of his request, and also making a new request for information, which was worded as follows: -

"1. How many Social Workers have put reports to the Family Court arena and then it found they were not registered with the HCPC, please give statistics for the past 48 calendar months?

2. How many social workers have Herefordshire Council suspended since January 2012?

3. How many social workers have Herefordshire Council dismissed since January 2012?

4. How many social workers of Herefordshire Council have been struck off by The HCPC since January 2012?"

7. On 9 April 2019 the Council wrote to the complainant, providing some general information in response to parts 1 and 2 of his original request. In relation to his new FOI request, the Council wrote to him on 23 April 2019, providing the information requested.
8. On 4 May 2019 the complainant wrote to the Council again seeking clarification as to its response to part 1 of his original request. The Council responded on 15 May 2019, stating that its response to part 1 of the complainant's original request remained the same. The complainant sought an internal review encompassing details from the Council's response to both requests on 3 September 2019. The Council responded to the complainant on 9 September 2019 stating that it would not be undertaking an internal review as this had been requested more than 40 days after the complainant's request.

Scope of the case

9. The complainant contacted the Commissioner on 4 August 2019 to complain about the way in which the Council had handled his requests for information. The Commissioner used her discretion in order to accept the complaint in the absence of an internal review.
10. The Commissioner has considered the Council's handling of the **complainant's requests**, in particular its application of the exemption as set out at section 40(2) of the FOIA.

Reasons for decision

Section 40-personal information

11. 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 requestor and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

14. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.

18. The Council has informed the Commissioner that the requested information is about a specific individual who can be identified from it and/or from other information which is linked to it.

19. In the circumstances of this case, the Commissioner is satisfied that the withheld information relates to an identifiable individual. The requested information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.

21. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

23. In the case of a FOI request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

25. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

26. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purpose of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

27. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:

- i. Legitimate interest test

Whether a legitimate interest is being pursued in the request for information;

- ii. Necessity test

Whether disclosure of the information is necessary to meet the legitimate interest in disclosure;

- iii. Balancing test

Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

28. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii).

Legitimate interests

29. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requestor's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requestor is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. In this case the complainant has an interest in the requested information and also, as acknowledged by the Council, there is a wider legitimate interest in disclosure as it would further the public's understanding of how the Council handles incidents of misconduct generally, which would give the public confidence in the Council's disciplinary processes and in Council officers. The Commissioner accepts that this is a legitimate interest.

Is disclosure necessary?

31. 'Necessary' means more than desirable but less than indispensable or absolute necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
32. The Commissioner is cognisant that disclosure under the FOIA is disclosure to the world at large. It is the equivalent of the Council publishing the information on its website. When considering the necessity test, she is not therefore considering whether providing the information *to the requestor* is necessary to achieve the legitimate interest, but whether it is necessary to *publish* the information.
33. As set out above, the Commissioner recognises the legitimate interest in the public being informed of the decision-making processes of the Council in circumstances involving misconduct proceedings. She also recognises the legitimate interest the complainant has in both the decision-making processes of the Council and this case in particular. The question is therefore whether it is necessary for the Council to disclose the requested information in order to meet the legitimate interests.

34. The Council has informed the Commissioner that it considers that the complainant's legitimate interest as set out in paragraph 32 above has been met by the disclosure of further general information to him by way of response on 9 April 2019. In response to the complainant's further request 'to clarify how Herefordshire Council would deal with a social worker conduct wise if he or she was found not to be registered with the HCPC' the Council provided a copy of its disciplinary policy and outlined the general circumstances in which the Council may be required to work with the HCPC. That information provides transparency about how the Council generally deals with such matters without linking or getting into the specifics of action taken against any individuals, and provides assurances that the Council has established processes in place.
35. However, the Council is aware that the complainant specifically requested information as to what specific action was taken in a particular case. This request cannot be addressed without the Council specifically providing the requested information to the complainant. The information regarding disciplinary action would not be disclosed by any other means, and disclosure under the FOIA in response to the complainant's request is the only way in which the complainant's, and the wider public's interest in this particular case can be satisfied. Therefore the Commissioner accepts that disclosure in this case is necessary to satisfy the relevant legitimate interests.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

36. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
37. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individual expressed concern about the disclosure; and
 - the reasonable expectations of the individual.

38. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. The Council states that the individual concerned has no reasonable expectation that details of the action taken by the council against them would be disclosed to the world at large. Employees of public authorities have a general expectation that a public authority, in its role as a responsible data controller, will not disclose certain information, such as personnel matters, and that it will respect their confidentiality.
41. The Council states that its '**Behaviour Policy**' which sets out the disciplinary process, procedure and guidance clearly states '**disciplinary matters will be treated confidentially**'. Likewise, the '**Formal Disciplinary Procedure**' which was previously released to the complainant, also states that those carrying out disciplinary investigations should '**stress to all concerned the confidentiality of the allegations and discussions**'.
42. Therefore, the individual concerned would have a very firm expectation that details of the action taken against them would remain private between themselves and their employer, the Council. Having obtained the individual's personal data in such circumstances, given the individual specific assurances as to how the data would be handled and based on the existing and long established policies and standard practices of the Council with regards to disciplinary matters, the individual concerned would have absolutely no expectation that such information would be shared with their peers or disclosed to the wider public, which release under FOI would essentially do.
43. The Council has confirmed to the Commissioner that, due to the nature of the information, the individual in question has not been asked whether they are willing to consent to the disclosure of their personal data. As set out above, disclosure would go against the Council's established policies and procedures concerning disciplinary matters which states '**disciplinary matters will be treated confidentially**'. Furthermore, seeking consent to disclosure would completely contradict the specific assurances given to the individual at the time the action took place regarding the way in which their personal data would be

handled. The Council has also stated that, although the name of the particular individual is known to a limited number of people, details of the disciplinary action taken by the Council is not public knowledge.

Unwarranted damage/distress which would be caused by disclosure

44. The Council has informed the Commissioner that disclosure would be highly distressing to the individual concerned, who has, as do all Council staff, an expectation that the Council would keep details of any disciplinary action confidential. If the information were to be disclosed the individual would likely feel very distressed that such personal information about them had been made available to their colleagues or the general public. They would suffer unjustified upset and distress if the matter, which they consider to be closed, was reopened in this way. It would not be fair for details of a disciplinary matter to be now brought into the public domain when the matter was dealt with at the time by the **individual's employer and professional body in** accordance with their established policies.
45. The Council also considers that release of the information could leave the individual open to the hostility of others, both members of the public and their colleagues, who may judge current or future decisions they make based on what they learn about them if the withheld information were disclosed rather than on the merits of the work they are currently doing. In addition it could cause unjustified damage to their future career prospects if the information were made public and linked to them, and unfair assumptions were made about their performance based on this information.
46. The Commissioner accepts the Council's arguments and has therefore concluded that disclosing the would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the withheld information would therefore breach the first data protection principle and thus is exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

47. 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@justice.gov.uk

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

48. 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.
49. 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 [REDACTED]

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Reference: IC-46 [REDACTED]

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