

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **26 March 2012**

Public Authority: **Cornwall Council**

Address: **Treyew Road
Truro
Cornwall
TR1 3AY**

Complainant: **Mr Graham Smith**

Address: **graham.smith@bbc.co.uk**

Decision (including any steps ordered)

1. The complainant requested the names of councillors from Cornwall Council (the council) who had had to be taken to court to force payment of council tax in the previous two years.
2. The Information Commissioner's (the Commissioner's) decision is that the council was correct to withhold the information under section 40(2) of the FOIA.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 16 August 2011, the complainant wrote to the council and requested information in the following terms:

"Please provide the name of any councillor who, over the past two years, had to be taken to court to force payment of council tax."

5. On 13 September 2011, the council confirmed that it held this information but refused it on the basis of the exemption at section 40(2) – personal data.

6. On 29 September 2011, the complainant asked for an internal review. The council's internal review on 26 October 2011 upheld its decision not to disclose the requested information under the personal information exemption.

Scope of the case

7. The complainant contacted the Commissioner on 16 August 2011 to complain about the way his request for information had been handled.
8. The Commissioner focused his investigation on the applicability of section 40(2) to the requested information.
9. On 29 November 2011, the complainant provided his arguments for disclosure to the Commissioner.
10. The council wrote to the Commissioner on 16 December 2011 setting out its arguments for withholding the requested information.

Reasons for decision

Section 40(2) – Personal information

11. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles.
12. In his letter to the Commissioner the complainant argued the following points:
 - That the names of any councillors taken to court for non-payment of council tax were already in the public domain and could be ascertained by trawling through court documents. The complainant added that this was difficult for anyone with limited resources to do.
 - That councillors are not 'ordinary citizens' because they set council tax rates and decide how to allocate council tax. He added that councillors are committing a criminal offence if they vote on the council's budget whilst in arrears themselves.
 - That the public's right to know in this instance outweighed the privacy of the councillors involved.

13. However, the council argued that disclosure of the information requested would lead to unjustified and unnecessary damage and distress to the data subjects, that this would be unfair, and therefore contravene the first data protection principle.
14. In order to reach a view on the council's application of this exemption, the Commissioner firstly considered whether or not the requested information was in fact personal data.

Is the requested information personal data?

15. Personal data is defined at section 1(1) of the Data Protection Act 1998 ("the DPA") as follows:

"personal data means data which relate to a living individual who can be identified-

 - (a) from those data,
 - (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."
16. When considering whether the information is personal data, the Commissioner has had regard to his own published guidance, 'Determining what is personal data'.¹
17. This information concerns living individuals. An individual is 'identified' if you have distinguished that individual from other members of a group. In most cases an individual's name together with some other information will be sufficient to identify them. In this case, the 'other information' is provided by the fact that we know these individuals are councillors in a specifically designated council.
18. The council argued that release of the information would identify members of the public who also happened to be elected councillors. The Commissioner agrees with the council that the provision of names within this context would render the individuals identifiable. The

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

requested information is obviously about particular individuals and is entirely personal data.

Is the information sensitive personal data?

19. For completeness, the Commissioner has considered whether the withheld information constitutes the sensitive personal data of the councillors.
20. Sensitive personal data is defined in the DPA as personal data which falls into one of the categories set out in section 2.
21. The council argued that the information sought would identify individuals who were subject to court proceedings. The Commissioner is satisfied that the requested information satisfies the definition of sensitive personal data under section 2(h) - personal data consisting of information as to:
(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings, or the sentence of any court in such proceedings."

Would disclosure contravene the first data protection principle?

22. Having accepted that the information requested constitutes the personal data and the sensitive personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.
23. The council has stated that disclosure of the information would breach the first data protection principle. The first data protection principle requires that the processing of personal data is fair and lawful and, at least one of the conditions in schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in schedule 3 is met. In the case of personal data, both requirements (fair and lawful processing and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

24. The focus of any consideration of section 40 is fairness. In considering whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
 - The reasonable expectations of the data subjects.

- The consequences of disclosure.

The reasonable expectations of the data subjects

25. A data subject's expectations are likely, in part, to be shaped by generally accepted principles of everyday interaction and social norms, for example privacy. It is accepted that every individual has the right to some degree of privacy and this right is enshrined in Article 8 of the European Convention on Human Rights.
26. The council argues that the data subjects would not expect their personal data to be disclosed, unless required by law or by their specific role as an elected representative.
27. The Commissioner's awareness guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

28. The council argues that the requested information relates to the private lives of individuals who are also elected representatives of the council. The council has not sought consent from the individuals involved and concludes that consent has not been given for that reason.
29. The Commissioner does not find the division between private and public life, in this instance, to be as distinct as the council suggests. The complainant argues that councillors taken to court for non-payment of council tax are not like any other private individual. Although the council has stated that payment of council tax is a private matter, separate from public office, the Commissioner considers that it is within the reasonable expectations of an individual who has taken public office to expect a higher degree of scrutiny and that information which impinges on their public office might be disclosed.
30. The Commissioner notes that the council's own code of conduct that councillors subscribe to when taking office has the following aspirations:

- *Accountability – members should be accountable to the public for their actions and the manner in which they carry out their responsibilities, and should co-operate fully and honestly with any scrutiny appropriate to their particular office.*
 - *Openness – members should be as open as possible about their actions and those of their authority, and should be prepared to give reasons for those actions.*
 - *Duty to uphold the law – members should uphold the law and, on all occasions, act in accordance with the trust that the public is entitled to place in them.²*
31. The Commissioner acknowledges that the code of conduct primarily refers to public duties arising out of the position as councillor. He accepts that there is a distinction as far as council tax is concerned because it is a levy on individuals irrespective of whether they are a councillor. However, he nevertheless considers that it is reasonable for councillors to expect that recent failure to pay council tax in a private capacity is likely to impact on public perceptions and confidence in those who have put themselves forward for such a public role. Therefore in some instances, for example where there are limited or no mitigating circumstances, it would be reasonable to expect that they may be identified as having been pursued via the courts for non payment.
32. The complainant has also raised the fact that the information he has requested could be obtained from the court records and therefore it is in the public domain. The Commissioner notes that during the course of his investigation the complainant has in fact obtained the requested information via the court. The Commissioner has considered how the availability of information from the court impacts upon the expectations of the data subjects.
33. Access to court records is made via application to the court and is at the discretion of the judge who will consider whether disclosure is necessary to ensure that justice is seen to be done. The factors that a public authority must consider when deciding whether disclosure under the FOIA would breach the first data protection principle are different. Where information may have been disclosed in court or accessed from

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<http://democracy.cornwall.gov.uk/documents/s20899/Code%20of%20Conduct%20or%20Members.doc.pdf>

the court it does not necessarily follow that it would be fair for a public authority to disclose it under the FOIA.

34. In the Commissioner's decision notice FS50075171, it was recognised that data is disclosed in court and could be reported. However, it concluded that later disclosure would be unfair because:

"...in practice public knowledge of the issues is only short lived and may be limited to only a small number of people. Even where cases are reported in newspapers this does not lead to the establishment of a comprehensive, searchable database of offenders."

35. The Tribunal later made clear that even if the information,

*"had entered the public domain by virtue of having been referred to during the Siddiqui trial in 2001, it does not necessarily follow that it remains in the public domain"*³.

It agreed with the Commissioner's observations in FS50075171 that,

"knowledge obtained in the course of criminal trials is likely to be restricted to a limited number of people and such knowledge is generally short-lived" (paragraph 85).

The Tribunal was therefore not satisfied that the information in question was in the public domain at the time of the request.

36. The Commissioner acknowledges that any elected representative might reasonably expect personal data of this nature to emerge via the media as a result of court action, however he does not think that this means it would be reasonable for the councillor to expect that a public authority would disclose the information in response to a request. Furthermore, even if information is published at the time a case is ongoing or decided, it does not necessarily remain in the public domain, though the Commissioner notes that the requested information in this case does relate to the relatively recent past. In any event the Commissioner does not consider that because records may be accessible from the court this automatically means that information is in the public domain. Finally he has not been provided with any evidence to show that the withheld information had been made public via that or any other means at the time of the request.
37. The Commissioner has considered how, if at all, the fact that the information is sensitive personal data affects the reasonable

³ EA/2008/0026

expectations of the data subjects. In particular, whether the data subjects have consented to the disclosure and/or have actively put some or all of the requested information into the public domain. This could mean that, although the data falls into the category of sensitive personal data, it is not sensitive to the data subjects. If either factor is relevant, then it is likely that any disclosure would be fair. In this case the Commissioner recognises that the data subjects have not consented to the disclosure, nor is there any evidence of steps being deliberately taken to put some or all of the information in the public domain.

38. In conclusion, the Commissioner considers that it would be reasonable for the data subjects to have some expectation of a higher level of scrutiny than a private individual, given that they are elected representatives and that their actions regarding council tax payment are likely to impact upon public confidence and perceptions about transparency and accountability. Where there are limited or no apparent mitigating circumstances surrounding non payment the Commissioner considers that the data subjects should reasonably expect to be identified. However, where this is not the case, on balance and bearing in mind the points above about information in court records and taking into account the fact that the information is sensitive personal data, he does not think that the data subjects would reasonably expect to be identified.

The consequences of disclosure

39. The Commissioner has noted the council's comments that, should this information be disclosed, there is a risk of harm to the individuals concerned.
40. The Commissioner accepts that there is an unquantifiable risk attached to the requested information being disclosed as it concerns individuals in public office and the public perception that their conduct might well have fallen short of the principles outlined in the council's code of conduct. Although he considers it to be largely a reputational risk that might in some cases have reasonably been foreseen, the release of specific names might provoke a hostile reaction.

Balancing the rights and freedoms of the data subject with legitimate interests

41. Notwithstanding the data subjects' reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.

42. The council recognises that there is a legitimate public interest in accountability and whether elected representatives are adequately performing their role. However, the council argues that council tax is levied on individuals, irrespective of their public role, and that there is a clear public interest in ensuring an individual's right to a private life is respected.
43. The council considers that there is no legitimate public interest in whether individual members of the public have failed to pay their council tax. It argues that this would contravene the rights and freedoms of the data subjects and that this position is unchanged, even where the individual is an elected representative.
44. The code of conduct that councillors subscribe to and the expectation of the general public mean that councillors are expected to act in accordance with the trust that the public has placed in them. However, even when there has been sufficient interest on the part of the public for these events to have been the subject of media coverage, it does not necessarily follow that disclosing this information would legitimately be in the public interest.
45. The council stated that there is a clear public interest in allowing the legal process to make such judgements in the light of the data subject's individual personal circumstances.
46. The Commissioner disagrees with the council's position that there is no legitimate public interest in revealing whether individuals have failed to pay their council tax where those individuals are councillors who have opted to stand for election and to fulfil a public representative role. In the Commissioner's view the public has a legitimate interest in satisfying itself that councillors who set and spend public money on council tax are paying that tax themselves. The Commissioner also recognises that when voting to elect councillors the public is asked to make a judgement on their character and that the information requested would be informative in this regard were any individuals to stand for re-election.
47. In balancing the legitimate interests of the public against the rights and freedoms of the councillors, regard must be had to the consequences of disclosure and the particular circumstances of the case. In this instance the Commissioner has noted the circumstances of the particular individuals in question. He is unable to provide significant details about those circumstances in this notice without risking identifying the individuals concerned. However, he has decided that for some there appear to be mitigating circumstances which in his view mean that their rights and freedoms are not outweighed by the legitimate interests of the public in transparency and accountability.

Therefore he has concluded that it would be unfair to disclose the name of those individuals and he has not gone on to consider the conditions in Schedules 2 or 3 of the DPA.

48. However, the Commissioner has decided that there are other individuals where there is compelling evidence that the legitimate interests of the public do outweigh the rights and freedoms of the data subjects and therefore it would be fair and lawful to release their information. In respect of this category he has therefore gone on to consider schedule 2 condition 6.

Is schedule 2 condition 6 satisfied?

49. The relevant provision in this case is condition 6 of schedule 2 of the DPA. The sixth condition establishes a three part test which must be satisfied;
 - there must be **legitimate interests** in disclosing the information,
 - the disclosure must be **necessary** for a legitimate interest of the public and,
 - even where the disclosure is necessary it nevertheless must not cause **unwarranted interference** (or prejudice) to the rights, freedoms & legitimate interests of the data subject.
50. The Commissioner has identified the legitimate interests in disclosing the information in the analysis above. He has also noted the consequences of disclosure earlier in this decision notice. To the extent that he considers disclosure would be fair in this case, the Commissioner is further satisfied that it would not result in unwarranted interference to the rights and freedoms of the data subjects given the circumstances he understands exist.
51. The Commissioner has therefore focussed on whether disclosure of those names is necessary. He notes that there is another regulatory mechanism that applies, specifically pursuance of non payment via the courts and that this mechanism has been used in this instance. In his view this goes some way to satisfying the public interest in transparency and accountability. However he does not consider that this fully satisfies those interests. Whilst he recognises the limited information that is being withheld, the names of councillors, he is, nevertheless, satisfied that disclosure of that information is necessary to satisfy the legitimate interests identified above. Furthermore he does not think that there are any alternative means of meeting the identified legitimate interests that would result in a more limited prejudice to the rights and freedoms of the data subjects. Therefore he has concluded that disclosure is necessary and that condition 6 is met.

Is a schedule 3 condition satisfied?

52. In order to comply with the first data protection principle when disclosing sensitive personal data, it is also necessary to satisfy a schedule 3 condition. The Commissioner has considered the relevant provisions, conditions 5 and 10 and has concluded that neither apply in this case for the reasons set out below.
53. Condition 5 is met where the personal data in question has "been made public as a result of steps deliberately taken by the data subject". The Commissioner has not been provided with any evidence to suggest that this condition is met in this case and therefore has concluded that it is not satisfied.
54. Condition 10 of schedule 3 provides a condition where,
- "The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph."
55. Statutory Instrument 2000 no 417 "The Data Protection (Processing of Sensitive Personal Data) Order 2000" is an order made by the Secretary of State for the purposes of DPA schedule 3, condition 10. This statutory instrument sets out a number of additional circumstances in which sensitive personal data may be processed. Paragraph 3 of this statutory instrument provides for disclosure of sensitive personal data in the following circumstances:
3. – (1) The disclosure of personal data –
- is in the substantial public interest ;
 - is in connection with –
 - the commission by any person of any unlawful act (whether alleged or established)
 - dishonesty, malpractice , or other seriously improper conduct by, of the unfitness or incompetence of, any person (whether alleged or established)
 - mismanagement in the administration or, or failure in services provided by , any body or association (whether alleged or established)
 - is for the special purposes as defined in section 3 of the Act; and
 - is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.
- (2) In this paragraph , "act" includes a failure to act."

56. Section 3 of the DPA states that:

“3. In this Act “the special purposes means any one or more of the following –

- the purposes of journalism,
- artistic purposes, and
- literary purposes”.

57. In the Commissioner's view, because disclosure under the FOIA is disclosure to the public rather than just to an individual applicant, the purpose that lies behind requests should not be taken into account when considering disclosure under the Act. Therefore, the Commissioner does not accept that disclosure of personal data in this case, which would be made under the FOIA, is permitted because it would be made for a “special purpose” of journalism, art or literature, as defined by section 3 of the DPA .
58. The Commissioner draws support for his approach from the Tribunals' dismissal of the appeal in the case of *The Rt Hon Frank Field MP v the Information Commissioner* (EA/2009/0055). Although this case didn't specifically relate to the “special purposes” provision of the statutory instrument it did confirm that the purpose behind requests should not be taken into account.
59. The Tribunal considered paragraph (1) of Statutory Instrument 2000/471 which provides for the processing of sensitive personal data in certain circumstances. It commented that, “that fact [the confirmation or denial] and the attendant disclosure cannot be said to be “for the purposes of prevention or detection of any unlawful act”, quite the contrary; any such confirmation or denial would be for the purpose of disclosure under FOIA and for no other purpose” (paragraph 34).
60. In light of the above the Commissioner has concluded that condition 10 is not met. Therefore, whilst the Commissioner has decided that it would be fair to disclose some of the personal data and that condition 6 of schedule 2 is met, it would nevertheless breach the first data protection principle to do so because a schedule 3 condition is not satisfied. The council was therefore correct to refuse to disclose the information on the basis that it was exempt under section 40(2).

Right of appeal

61. 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

62. 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.
63. 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 

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