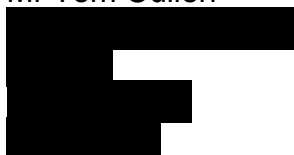


**Chief Legal Officer:
Kathryn Pettitt, Solicitor**

**LEGAL SERVICES
Resources and Performance
Post Point CHO234
Hertfordshire County Council
County Hall
Hertford
Herts SG13 8DE
DX 145781 HERTFORD 4**

Mr Tom Cullen



**Tel: 01992 [REDACTED]
Minicom: 01992 555541
Fax: 01992 555508
Email: [REDACTED]
Contact: Mrs Daljit Kaur
My ref: DK/NP132
Your ref:
Date: 22 May 2014**

Dear Mr Cullen,

RE: INTERNAL REVIEW OF INFORMATION PROVIDED UNDER THE FREEDOM OF INFORMATION ACT 2000

I have been informed that you have requested a review of the above request made by you on 29 April 2014.

I am a solicitor employed by Hertfordshire County Council ("the Council") and I have reviewed your request under our internal review procedures. In carrying out such a review I have had sight of your original request and the Council's response.

History

On 10 April 2014, the Council received the following request from you:

"Would you please let me have all the recorded information you hold on solicitors employed by Herts CC who were absent from work between 1 DEC 2013 and 28.feb.2014 due to sickness

Please let me have the dates that absence commenced and the dates the solicitors returned to work

I am particularly interested in Solicitors that work in the section that deals with issues that concern Freedom of Information Requests If you would let me know the sickness records of the solicitors who work in this area in particular"

Your request was responded to on 24th April 2014. The Council confirmed that it held the information that you had requested. However, after consideration the Council decided that the information requested should be withheld under the exemption contained in Section 40(2) of the Freedom of Information Act 2000 relating to third party personal data.

The Law

Section 1 of the Freedom of Information Act 2000 (“the FOIA”) states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it. Section 10(1) provides that this should be supplied within 20 working days.

The FOIA deals with official information held by public authorities in England. Hertfordshire County Council is a public authority.

Official information refers to recorded information such as emails, meeting minutes, research or reports. The FOIA gives you the right to request official information held by public authorities, unless there are good reasons to keep it confidential.

It aims to make public sector bodies more open and accountable. It also helps people to understand better how public authorities carry out their duties, why they make the decisions they do and how they spend public money.

There are a number of exemptions under the FOIA, the application of which permit certain information to be withheld from disclosure. The relevant Section applicable to your request is Section 40 (and in particular subsection (2)), which states:

40 Personal information of the Freedom of Information Act 2000

- “(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) 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.
- (3) 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, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

....

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.”

Section 1 of the Data Protection Act 1998 states:

“(1) In this Act, unless the context otherwise requires—

“**data**” means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, . . .
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; [or
- (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);]

“**personal data**” means 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 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 intentions of the data controller or any other person in respect of the individual;

Section 2 of the Data Protection Act 1998 states:

In this Act “**sensitive personal data**” means personal data consisting of information as to—

...

- (e) his physical or mental health or condition,

....

Section 40(2) of the FOIA therefore provides an exemption from disclosure for information which is the personal information of an individual other than the applicant, and where one of the conditions listed in Section 40(3) or 40(4) is satisfied.

Review

This review concerns the application of the duty to provide information under the FOIA and the application of any relevant exemptions, and in particular Section 40(2).

In this case, the request is for ***“all the recorded information you hold on solicitors employed by Herts CC who were absent from work between 1 DEC 2013 and 28.feb.2014 due to sickness”*** and in particular those ***“that work in the section that deals with issues that concern Freedom of Information Requests”***.

On 24 April 2014, the Council confirmed that it does hold the information that you requested, but withheld it under the exemption contained in Section 40(2) of the FOIA

Section 40(2) provides that any information to which a request for information relates is exempt information if it constitutes personal information of which the applicant is not the data subject and either the first or the second condition contained in Section 40(3) or 40(4) is satisfied.

“Personal Data” is defined under Section 1 of the Data Protection Act 1998 as “data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”.

In this case, it is evident that “personal data” is being requested. Information about absence due to sickness between December 2013 and February 2014 by solicitors that deal with Freedom of Information Requests is personal. This is because it is considered that the living individuals to whom this information relates would be identifiable from the information which is requested and from information already available.

There is a further category of “Sensitive Personal Data” which is defined under Section 2 of the Data Protection Act 1998 and includes personal data consisting of information as to a person’s physical or mental health or condition.

The information requested in relation to absence periods can be considered as personal data. However any information about sickness as it relates to an individual's health or condition can be regarded as sensitive personal data.

The first condition (under Section 40(3)) is satisfied in this case, as the information requested falls within the definition of "data" under the Data Protection Act 1998 and disclosure of the information to you (a member of the public) would contravene at least one of the data protection principles contained in Schedule 1 of the Data Protection Act 1998. In particular the first principle would be contravened:

1. 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, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Therefore in order to share the requested information which is personal data, at least one of the conditions within Schedule 2 must be met. The conditions set out in Schedule 2 include:

- 1 The data subject has given his consent to the processing.
- 2 The processing is necessary—
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
- 3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
- 4 The processing is necessary in order to protect the vital interests of the data subject.
- 5 The processing is necessary—
 - (a) for the administration of justice,
[(aa) for the exercise of any functions of either House of Parliament,]
 - (b) for the exercise of any functions conferred on any person by or under any enactment,
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
- 6 (1) 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.

(2) The [Secretary of State] may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

From the information before me, I can confirm that none of the conditions in Schedule 2 as set out above have been satisfied.

Furthermore in order to share any sensitive personal information, at least one of the conditions within Schedule 3 must be met. The conditions set out in Schedule 3 include:

- 1 The data subject has given his explicit consent to the processing of the personal data.
- 2 (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.....
- 3 The processing is necessary—
 - (a) in order to protect the vital interests of the data subject or another person, in a case where—
 - (i) consent cannot be given by or on behalf of the data subject, or
 - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
 - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
- 4 The processing—
 - (a) is carried out in the course of its legitimate activities by any body or association which—
 - (i) is not established or conducted for profit, and
 - (ii) exists for political, philosophical religious or trade-union purposes,
 - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
 - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
 - (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.
- 5 The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
- 6 The processing—
 - (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
 - (b) is necessary for the purpose of obtaining legal advice, or
 - (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.
- 7 (1) The processing is necessary—
 - (a) for the administration of justice,
 - [(aa) for the exercise of any functions of either House of Parliament,]
 - (b) for the exercise of any functions conferred on any person by or under an enactment, or

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The [Secretary of State] may by order—

- (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
- (b) provide that, in such cases as may be specified, the condition in subparagraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

[7A

(1) The processing—

(a) is either—

(i) the disclosure of sensitive personal data by a person as a member of an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation; or

(ii) any other processing by that person or another person of sensitive personal data so disclosed; and

(b) is necessary for the purposes of preventing fraud or a particular kind of fraud.

(2) In this paragraph “an anti-fraud organisation” means any unincorporated association, body corporate or other person which enables or facilitates any sharing of information to prevent fraud or a particular kind of fraud or which has any of these functions as its purpose or one of its purposes.]

8 (1) The processing is necessary for medical purposes and is undertaken by—

(a) a health professional, or

(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

(2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.

9 (1) The processing—

(a) is of sensitive personal data consisting of information as to racial or ethnic origin,

(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and

(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

(2) The [Secretary of State] may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.

10 The personal data are processed in circumstances specified in an order made by the [Secretary of State] for the purposes of this paragraph.

From the information before me, I can confirm that none of the conditions in Schedule 3 as set out above have been satisfied.

Accordingly the first condition set out in Section 40 (3) is met and the information that has been requested is therefore exempt information under Section 40(2) of the Freedom of Information Act 2000.

In terms of the disclosure of the information requested being fair, employees of the Council would not reasonably have expected that information about their absence from work due to sickness could be made public. Furthermore disclosure of such information can be regarded as unduly intrusive of their personal circumstances.

The Information Commissioner has advised that “the default in personal data cases is against disclosure”, and in this case I do not consider that there are any arguments in favour of disclosure which would outweigh the arguments in favour of the privacy of individual’s absence arising from sickness.

Decision

Having considered all the above matters and the information before me, I find in reviewing this matter that Hertfordshire County Council did comply with the Freedom of Information Act 2000 and has correctly applied the exemption contained in Section 40(2) of the Act.

Conclusion

This now brings the Council’s internal review into the handling of your request for information to an end. However, if you remain dissatisfied you are entitled to ask the Information Commissioner to investigate your complaint. You can write to him at **FOI/EIR Complaints Resolution**, Information Commissioners Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely

Daljit Kaur
Solicitor
For and on behalf of Chief Legal Officer