By email to: request-234745-85879a18@whatdotheyknow.com

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18 February 2015

Dear Mr/Ms Scully,

Internal review of the handling of your Freedom of Information request

Thank you for your request for an internal review of Southwark Council's response to your Freedom of Information (FOI) request, our reference 462923. I have conducted a thorough review of the handling of your request and my findings are set out below.

Your request

On 20 October 2014, you wrote to the council to request information relating to the case of AA v London Borough of Southwark, the judgement for which was handed down in the Queen's Bench Division of the High Court on 14 October. You sought information about the out of court settlement that was agreed and the actions taken against the staff concerned. The full text of your request is reproduced in Annex 1; however for convenience I have extracted your questions from the full text:

1) How much was this settlement for?

2) If available, how was this settlement apportioned between exemplary, aggravated, special and general damages (and any other heads of loss)?

3) What action has been taken against all of the council employees who have been criticised in the judgment in this case?

The council issued you with a refusal notice under the FOI Act on 6 November, a copy of which is attached as Annex 3. The council responded as follows:

1) How much was this settlement for?
The settlement is confidential.

2) If available, how was this settlement apportioned between exemplary, aggravated, special and general damages (and any other heads of loss)?
The settlement was not apportioned.

3) What action has been taken against all of the council employees who have been criticised in the judgment in this case?

In reply to this question, we consider the information requested to be personal data and under section 40 of the Freedom of Information Act, personal data, we are not able to provide this as we maintain that releasing this information is not compatible with the Council's requirement to process personal data fairly and lawfully.Section 40 is one of the absolute exemptions under the Act and is not subject to the public interest test.

Issues on Review

On 10 December you wrote to the council to request an internal review. A copy of your email is reproduced in Annex 2. You requested that the council review two aspects of its response and for convenience, this review will address each issue in turn.

Issue One

The first part of your request for review is as follows:

In relation to my original question 1, as to the value of the settlement: Your response to this is in breach of section 17(1)(b) of the Freedom of Information Act - I have an absolute right to know under which exemption you have refused me access to this data.

I find that the council did not meet its obligation under section 17 of the FOI Act. As you are aware, where a public authority seeks to withhold any information under the exemptions listed in part II of the Act, the public authority is obliged under section 17(1) to provide a refusal notice that:

(a)states that fact,

(b)specifies the exemption in question, and

(c)states (if that would not otherwise be apparent) why the exemption applies.

In its original refusal notice, the council neither cited an exemption nor explained why an exemption applied to the value of the settlement. As a result of this review, I am now able to provide you with a full response as to why the council has withheld this information. Please accept my apologies for the delay that you have experienced in receiving a full response and for the fact that we must by necessity, introduce new exemptions at this late stage.

<u>Section 40(2) (third party personal data)</u>

The council considers the settlement to be confidential because the agreement contains personal information relating to the claimant. The council considers that section 40(2)(third party personal data) applies to this information, because disclosure would contravene the first data protection principle, fairness.

As you are aware, section 40(2) together with the condition in section 40(3)(a)(i) provides an absolute exemption and does not require consideration of the public interest test; however the council has had regard to guidance from the Information Commissioner's Office (ICO) on determining whether disclosure would be fair.

When assessing whether a disclosure is fair, the ICO advises that public authorities make these considerations:

- whether the information is sensitive personal data;
- the possible consequences of disclosure on the individual(s) concerned;
- the reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; the FOIA principles of transparency and accountability; and
- any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the data subjects.

In this case, the council recognises that there would be a legitimate interest in the public having insight into how public funds are spent. However as the claimant is a member of the public whose anonymity has been carefully maintained throughout the case, and because the terms of the agreement are subject to a confidentiality clause, the claimant's reasonable expectation of privacy would be so high as to outweigh any legitimate interests; therefore disclosure would be unfair. It should also be noted that any information provided by the claimant would have been given specifically for the purposes of the settlement agreement.

In making this decision the council has also had regard to the decision of the First Tier Tribunal in *Trago Mills (South Devon) Ltd v Information Commissioner EA/2012/0028*.

Section 41 (information provided in confidence)

For completeness, the council also considers that the settlement agreement would be exempt under section 41 (information provided in confidence).

The council has been informed by the ICO guidance on confidentiality and is satisfied that information provided by the claimant is confidential, based on the following considerations.

- The information has the necessary quality of confidence. It is not highly sensitive, but it is financial information relating to a member of the public, which has an inherent 'feel' of confidentiality
- It is certainly not trivial information and it is not available in the public domain

The confidentiality clause contained within the settlement represents an explicit expectation of confidentiality on the claimant's behalf and the council is of the opinion that the information is therefore held under an obligation of confidence. As such, disclosure of the information would give rise to an actionable breach of confidence.

The council is satisfied that the breach of confidence would be actionable, based on the following considerations.

- The council is satisfied the information in question is in fact confidential
- The claimant would have the legal standing to take action

The council has further considered whether there would be any overriding public interest in disclosure and finds that, whilst there would be a public interest argument in favour of openness and transparency by the council, this would be far outweighed by the need to maintain trust in, and the free flow of information from the public to, to public authorities.

Section 36(2)(c) (information prejudicial to the conduct of public affairs)

The council has sought the opinion of its 'qualified person' for the purposes of the FOI Act and finds, in the reasonable opinion of its qualified person, that the exemption from disclosure under section 36(2)(c) is engaged with regard to the value of the settlement. This exemption applies to information which, if disclosed, would prejudice or would be likely to prejudice the effective conduct of public affairs. This exemption is engaged because the principle of confidentiality is vital to the ability of the council settle costly and contentious litigation by way of confidential negotiations and settlements in the future. Disclosure in this case would be prejudicial for the reasons out below; after which I have set out the public interest arguments as considered by the qualified person.

In the context of litigation, court rules encourage parties to consider ways of achieving settlement to avoid the time and expense of court (or continued court) proceedings. Disclosure in this case would be contrary to a strict confidentiality clause and would be prejudicial to the resolved dispute as the consequences would include the possibility of further litigation between the parties. One of the purposes of the use of confidentiality clauses within settlement agreements is as an aid to compromising costly litigation - put simply the prospect of keeping personal matters confidentiality can often assist the parties achieve a compromise.

Disclosure would also prejudice the council's ability to use negotiation and other alternative (to court and less expensive) dispute resolution in future cases as a way to avoid costly litigation. Were the council to breach a confidentiality agreement in this case, the promise of confidentiality in future clauses would be of little assurance to future claimants. The council engages in wide ranging statutory functions which inevitably involve a significant amount of litigation/threat of litigation; in order for the effective conduct of such affairs, the council and other parties' concerned need to be confident that a confidentiality clause can be relied on.

In considering the application of section 36(2)(c), the council has had regard to the ICO's decision in in favour of Stoke-on-Trent City Council in decision notice FS50426113.

The public interest in favour of maintaining the exemption

- Settlement agreements allow the council a substantially less expensive alternative to litigation and it is therefore in the public interest, in terms of value for money, that the council be able to continue to reach this state of compromise in future cases
- It also in the public interest for the council not to open itself up to renewed litigation in relation to the resolved dispute in question

The public interest in favour of disclosure

- The council recognises the benefits of openness and transparency where the use of public funds is concerned, particularly where there is recourse to court action due to the costly nature of litigation
- There is also an argument for openness and transparency in terms of decision making, whereby residents will have an interest in, and a wish to scrutinise, the fairness of a public authorities actions, especially in high profile cases involving contentious actions by the public authority itself

The balance of public interest

The council has weighed the above arguments and found that on balance, the arguments in favour of maintaining the exemption outweigh the arguments in favour of the disclosure.

The case in question was high profile and contentious, generating much interest from the public. However this in itself does not constitute a public interest argument and while the council accepts that it is important to demonstrate to residents that it acts in their interests, the very existence of the settlement agreement is evidence of the council doing just that.

By adhering to the confidentiality clause, the council can therefore to continue to use settlement agreements in the future for very real and substantial benefits to the public purse. It is clear that disclosure would contribute to openness and transparency but it is arguable to what degree. It is therefore the opinion of the qualified person that the information should be withheld.

Issue two

The second part of your request for review is as follows:

> *3) What action has been taken against all of the council employees who have been criticised in the judgment in this case?*
>
> *Sections 40(2) and 40(3)(1)(a) together only provide an absolute, unqualified exemption where one of the data protection principles under the Data Protection Act has been breached… You must start by considering whether it is "fair": the ICO cite the relevant factors as being whether the information is "sensitive", the potential consequences of disclosure, reasonable expectations of the subject, and the legitimate interests of the public (and an ultimate balancing exercise). I do not consider that my request for anonymised data amounts to personal data within the DPA/s 40 FOIA at all, and I would like you to address that point in addition.*

Information in the public domain

The staff in question were named when the judgement was handed down. The council then confirmed that it had taken disciplinary action against the named individuals and the following information is already available on the Southwark Council website:

> *Action at the time*
>
> - *The actions of two income officers and one resident officer clearly amounted to gross misconduct and should proceed to disciplinary panels*
> - *The actions of one income officer clearly amounted to misconduct and should proceed to a disciplinary panel*
> - *The actions of one resident services manager and one income and debt manager clearly amounted to a lack of supervision*
>
> *In each case charges were levelled and heard by independent disciplinary panels. This resulted in sanctions being issued to all the staff involved.*

In addition, it is already in the public domain that no staff were dismissed.

For the avoidance of doubt, this review and the information withheld therefore amounts to a further breakdown of this disciplinary action, sanctions taken and the outcome of such action for individuals.

Findings

I find that the council was correct to apply section 40(2) to this part of your request. As you are aware, section 40(2) together with section 40(3)(1)(a), provide an absolute exemption that is not subject to the public interest test, where disclosure would breach one of the data protection principles as set out in the Data Protection Act (DPA). In this case, the council maintains that disclosure would breach the first data protection principle, fairness.

In deciding whether disclosure of personal data would be fair, I have had regard to the ICO guidance, as per your request. The ICO takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed
- Whether there is a pressing social need for disclosure of the information that would override the expectations of the individual or any detriment that may be caused

Expectation of the individual

The information sought does not meet the definition of sensitive personal data as set out in the DPA. However the council considers disciplinary data in general to be personal data that would afford the highest level of protection. This type of information 'feels' sensitive to

data subjects in the same way that financial data, whilst not defined as sensitive, is information that public authorities are expected to protect under their duty of care to their employees.

In Lord Dunboyne v Information Commissioner EA/2011/0261 & EA/2011/0303, the Tribunal addressed the issue of requests for information on the disciplinary files of employees. It said at paragraph 32:

> *"The Tribunal has – and will continue to – recognise the strong expectation of staff members that disciplinary matters are personal and to be kept private."*

It is accepted that, when working for public authorities, staff will expect that some information about them will be made public. However this expectation would only extend to information about them in their role, or their 'public life'.

Details of disciplinary action fall within the category of 'private information' as they relate more to individuals private lives than their public roles. The council would reference the decision reached in Gibson v Information Commissioner and Craven District Council (EA/2010/0095), in which the First Tier Tribunal accepted that information about individual employees would be held for the purposes of human resources management, and would attract a strong expectation of privacy and protection.

There is an implied duty of confidence between an employer and employee where this kind of information is concerned and therefore disclosure would be outside the reasonable expectation of staff.

Consequences of disclosure

The council considers that the disclosure of the withheld information would have an adverse effect on the named individuals. Disclosure would likely be reported upon by the local press alongside the names of those concerned and this scrutiny would cause unwarranted distress and detriment to the individuals concerned, as well as potential harassment. The council has an overriding duty of care to protect its employees from distress of this nature, as well as an overall obligation to protect the rights of data subjects.

Overriding need for disclosure

It is clear from your request that you feel disclosure of the requested information would provide public assurance that proper action was taken by the council in what was undoubtedly an emotive case. The council recognises that there is a strong argument for the disclosure of some information to the public in order to be accountable and transparent to the people it serves. Disclosure would however be limited to information that there is a pressing social need to disclose and I find that this need has been met by the detailed breakdown on actions taken at the time, as set out in 'information in the public domain', above.

Conclusion

Disclosure of the information in question would not be within the reasonable expectation of the data subjects and could result in detriment or distress as a result of reporting on individuals by the media. I recognise the legitimate public interest in transparency and disclosure of information to the public, especially given the nature of this case, but consider that the council has fulfilled this legitimate interest in the information about disciplinary proceedings that has already been disclosed. The disclosure of the small amount of remaining information would be a breach of the council's obligations under the DPA.

Anonymised data

I note your request for the council to consider releasing in an anonymised format. However, due to the small number of individuals concerned and the detailed information that the council has already released, there is no meaningful way in which the information could be anonymised to avoid jigsaw identification.

Appeal Rights

If you are dissatisfied with this decision you have recourse to the Information Commissioner. You should contact him within 2 months of this response. Contact details are:

Wycliffe House
Water Lane
Wilmslow SK9 5AF
Telephone: 0303 123 1113
Website: www.ico.org.uk

Yours sincerely,

Lisa Quarrell
Information Governance Manager

Annex 1 – Your original request

This week, the judgement of HHJ Anthony Thornton QC in the case of AA v London Borough of Southwark was handed down in the Queen's Bench Division of the High Court. (Neutral citation [2014] EWHC 500 (QB); case number HQ13X02922.)

The Council's employees were found liable for unlawful eviction, conspiracy, misconduct in public office, and negligence. (The judgment can be read in full here: http://www.bailii.org/ew/cases/EWHC/QB/2014/500.html) An out of court settlement was reached as to quantum before the start of the second trial, which was to determine the damages to be paid to AA. Please provide the following information:

1) How much was this settlement for?

2) If available, how was this settlement apportioned between exemplary, aggravated, special and general damages (and any other heads of loss)?

(I am aware that there is a limited anonymity order in place in relation to this case, but HHJ Thornton's judgment says it is "confined to the identity and precise address of the claimant". Nonetheless, if you would otherwise decline my requests under 1) or 2), I am content for you to round the figures in the settlement into an approximation to avoid any possibility of identifying him.)

3) What action has been taken against all of the council employees who have been criticised in the judgment in this case? In particular, those in paragraph 187 listed as "Mr Davis, Ms Okwara, Ms Ashley, Ms Maresch, Ms Marsh [and] Ms Scheibner" where it is said of them that "It is clear that all these officers knew, or had turned a blind eye to the fact that AA had been unlawfully evicted and that his possessions were still in the flat despite his having been evicted and that they were about to be removed and destroyed." I am also interested in the outcome for "Mr Ola Akinsola", who is mentioned in paragraph 196. If any other disciplinary action has been taken as a result of this case which is not covered by the rest of this request, please supply me with the outcome of that as well.

If, and only if, you are otherwise unwilling to supply me with this information, I will accept being told (e.g.) that 1 was dismissed for gross misconduct, 2 have undergone retraining etc. I am aware that this might be considered personal information, however, I would urge you to consider the public interest element in relation to this: these are officers of the council who have been found to have committed misconduct in public office and a civil conspiracy by a High Court judge, and their names are already in the public domain as having done so in any case.

Annex 2 – Request for internal review

In view of your response earlier today, I'm happy to drop my previous request for an internal review over the timing of your response. However, I wish to request a further one over its content, for the purposes of which I have tried to set out my arguments as briefly as possible below:

In relation to my original question 1, as to the value of the settlement:

Your response to this is in breach of section 17(1)(b) of the Freedom of Information Act - I have an absolute right to know under which exemption you have refused me access to this data . There are no exceptions to this duty to inform me. Once you have told me which exemption you are purporting to rely on, I will provide further argument against this if it appears to me to be incorrectly applied in all the highly unusual circumstances of this case. There is no general exemption of "confidentiality", and even if there were, you would need to state the section of the FOIA it resided in.

In relation to question 3, as to any disciplinary action undertaken against named and other staff:

You are right that section 40(2) is not subject to a public interest test. However, sections 40(2) and 40(3)(1)(a) together only provide an absolute, unqualified exemption where one of the data protection principles under the Data Protection Act has been breached. The ICO's guidance, located here http://ico.org.uk/for_organisations/freedom_of_information/guide/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf, at paras [32]-[38] demonstrates how only data protection principle 1 is in fact engaged, so I will deal only with that here - should your internal reviewer wish to rely on any other principle under section 40(2), then I will be glad to provide fuller submissions on that point upon request.

In argument here, I will follow the ICO's approach to assessing whether to disclose under the first data protection principle, available at para 39 and following of the above link, which is supported as the correct approach by the cases they cite in that guidance. You must start by considering whether it is "fair": the ICO cite the relevant factors as being whether the information is "sensitive", the potential consequences of disclosure, reasonable expectations of the subject, and the legitimate interests of the public (and an ultimate balancing exercise). I do not consider that my request for anonymised data amounts to personal data within the DPA/s 40 FOIA at all, and I would like you to address that point in addition.

This information cannot be considered sensitive under s 2 of the DPA. It is certainly not under (g): it is not "personal data consisting of information as to...the commission or alleged commission of an offence" since, firstly, these are civil proceedings, and any crimes committed by your officers diverge from the (admittedly similar) torts the employees were found to commit, both in content and the requisite burden of proof. Secondly, it is not personal data AS TO that: they have been named in the judgment. Subsequent disciplinary proceedings are at best ancillary as to the commission of these torts, not to any crimes.

Given this, I will not consider whether any of the Schedule 3 conditions of the DPA apply to this information.

The adverse consequences on employees of the disclosure of this data are relatively minimal: having publicly known the results - even anonymised! - of the disciplinary proceedings surely pales into comparison next to being found to have individually committed egregious misconduct in public office (and so on) by the High Court, which information is freely in the public domain on the Bailii website in perpetuity. For the employees, their proven misconduct might again be publicly highlighted, but it is important to bear in mind that this is very much an adverse effect that they have brought upon themselves. Of course, if they were exonerated by the tribunal, then disclosure would in fact have a positive effect on the employees, since they would not longer be as associated with a proven incidence of misconduct.

Your officers are in a public position, and have been publicly found to have committed misconduct. It is hard to see that they would have a great expectation of privacy at the subsequent disciplinary proceedings, though given the inadequacy of the reasoning you supplied in response to this request, it is hard to respond with any specificity. There is of course a general expectation of privacy in disciplinary proceedings, but in a case of such appalling wrongdoing, that is not conclusive of the data protection principle of whether it is "fair" on the data subject to disclose this information to me. At the balancing of interests stage, I would invite you to look at para [80] and following of the ICO's guidance above: this is clearly a case where there is an overriding public interest in disclosure, for obvious reasons: this is the worst case of public authority wrongdoing I have read about in a very long time, involving a concerted cover-up, and appalling failures right up to trial in discharging, for example, the council's disclosure obligations in relation to the internal report. It is important for the public to know what eventually happens to people who have committed such awful wrongs, and to find out whether or not the council has just ignored the High Court and let these employees - so clearly unsuited to public-facing roles dealing with the most vulnerable in society in social housing - continue working as they did before, with no repercussions from their proven conspiracy (etc.).

As to the schedule 2 DPA condition to permit disclosure once it is regarded as "fair", I would like to rely on condition 6. I have already covered the legitimate interest test and the residue of individual harm caused is certainly not "unwarranted", for the reasons explained above. Therefore, I only want to address here the question of necessity of disclosure: as explained in the case of Corporate Officer of the House of Commons v the Information Commissioner and Ben Leapman, Heather Brooke and Michael Thomas (EA/2007/0060-63, 0122-23 & 0131, 26 February 2008), this requirement is about whether it is necessary (in the sense that nothing else will do) to achieve a legitimate aim, and whether nonetheless that disclosure is proportionate to that aim. It is submitted here that only knowing the results of the disciplinary tribunals, even if that is in "2 dismissed, 3 no action" etc. form (which is very much my fall-back position), is going to be enough to satisfy the public interest as described above. The limited adverse effects on these employees are not disproportionate to the overriding public interest in knowing about the outcome to those involved in this truly exceptional case.

For the avoidance of doubt, I am satisfied that you do not hold the information requested in question 2, so I am not asking for an internal review into that answer. However, I am not satisfied that you initially provided adequate reasons in relation to section 40 for refusing my request number 3, as required by section 17(1)(c) of the FOIA, and I am certainly not satisfied that you complied with your section 17 obligations in relation to request 1. I am willing to be contacted at any point to clarify any of the issues I have raised in this request for an internal review or my original request. Please acknowledge my request for an internal review as soon as possible, and let me know when it will be completed by.