

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 3 August 2009**

**Public Authority:** London Borough of Bromley  
**Address:** Bromley Civic Centre  
Stockwell Close,  
Bromley, BR1 3UH

### Summary

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The complainant requested details from the public authority of the annual pension and lump sum payment for an ex employee and whether the lump sum was tax free. The information was withheld under Section 40 (2) of the Act. The Commissioner found that Section 40 (2) was engaged and that the public authority was right not to disclose the information.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 23 June 2007 the complainant requested the following information:  
  
"What the annual pension and lump sum payment for an employee (former Chief Planner) was and whether the lump sum was tax free."
3. The public authority replied to the complainant on 13 July 2007 refusing to disclose the information as it was considered personal data and that disclosure would be a breach of its duties under the Data Protection Act 1998.
4. Following the complainant's request for an Internal Review on 13 July 2007 the public authority wrote to the complainant on 15 August 2007 upholding the decision not to disclose the information, citing Section 40 as the exemption.

## The Investigation

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### Scope of the case

5. On 20 August 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He stated his belief that the information should be in the public domain as the employee's pension and lump sum would be funded from the public purse.
6. The investigation considered whether the public authority applied the Freedom of Information Act 2000 correctly and particularly, whether Section 40 applied.

### Chronology

7. The Commissioner wrote to the public authority on 8 December 2008 informing it that he would be taking forward the complaint. As it had not been clear from the documents, the Commissioner enquired whether the public authority had released information about the pay band of a Chief Planner and details of how a local government pension was calculated. He also referred to similar cases which had resulted in Decision Notices for them to consider.
8. The public authority replied to the Commissioner on 23 December 2008, confirming that they had written to the complainant on 13 September 2007 with the salary banding information of a Chief Planner and had also sent a copy of the Local Government Pension Scheme.
9. The Commissioner wrote to the complainant on 15 January 2009, informing him of the reply he had received from the public authority. He also provided relevant guidance and similar case studies, and confirmed his understanding of the complaint.
10. After a further exchange the complainant replied on 5 February 2009 restating his belief that the information he was seeking was not personal data as the pension and lump sum would be paid by the tax payer.

### Findings of fact

11. The employee in question was the Chief Planner who had retired from the public authority.

### Analysis

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### Exemption

#### Section 40(2)

12. Section 40(2) provides an exemption for information which is the personal data of a third party, where disclosure would breach any of the data protection principles

contained in the DPA. In order to rely upon the exemption provided by section 40(2) the requested information must constitute personal data as defined by the DPA section 1(1) which defines personal data as:

... 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.

13. The public authority argued that the requested information constitutes the personal data of the ex-employee.
14. All of the information withheld is about the employee. He is identifiable from the data, which would include his name, annual pension amount and lump sum amount. The Commissioner was therefore satisfied that it constitutes the employee's personal data.

### **The first data protection principle**

15. The public authority refused to disclose the information to the complainant as they considered it personal data and therefore disclosure would breach the Data Protection Act. There are two parts to the first data protection principle:
  1. Personal data must be processed fairly and lawfully, and
  2. Personal data shall not be processed unless one of the conditions in the DPA Schedule 2 is met.
16. The Commissioner agrees that the relevant data protection principle is the first principle which requires any processing to be fair and lawful. The Commissioner has considered the withheld information and the individual's reasonable expectation that this information would not be disclosed.
17. The Commissioner's Awareness Guidance (AG1) deals with personal data and makes it clear that the seniority of the official should be taken into account when personal data is requested under the Act: 'The more senior a person is the less likely it will be that disclosing information about their public duties will be unwarranted or unfair' (pg 8).
18. The employee was the Chief Planner of the public authority and therefore had a relatively high profile. Although people at this senior level may have information about them put into the public domain, information of the nature requested is not usually publicly available.
19. The Commissioner notes the Information Tribunal's (the Tribunal) decision in the House of Commons v The Information Commissioner and Norman Baker MP (EA2006/0015 and 0016) which recognised that when considering the disclosure of personal data, a distinction can be drawn between information relating to public

and private lives. The Tribunal found that when assessing fair processing the interests of the data subject are no longer paramount considerations, so far as 'public officials are concerned where the purposes for which the data are processed arise through the performance of a public function'.

20. The Tribunal also said that the interest of the data subject are still important, but where those individuals: 'carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives' (paragraph 78).
21. Although the employee was in a senior position in the public authority and the information relates to his public life, the Commissioner is satisfied that he would have had a reasonable expectation that the requested information would not be disclosed.
22. The Commissioner recognises that even amongst senior members of staff there would still be an expectation of privacy between the ex-employee and employer regarding their employment.
23. When looking at fairness the Commissioner also considered paragraph 6 in Schedule 2 of the DPA, which is one of the conditions for processing personal data. This is satisfied where:

'The processing is necessary for the purposes of legitimate interests by the data controller or by a 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'.
24. The Tribunal looked at paragraph 6 Schedule 2 in its decision in *House of Commons v The Information Commissioner and Norman Baker MP* (EA2006/0015 and 0016) and suggested that the 'application of paragraph 6 Schedule 2 of the DPA involves a balance between the competing interests broadly comparable, although not identical, to the balance that applies under the public interest test for qualified exemptions' (paragraph 90). In order to satisfy the sixth condition (and the second part of the first data protection principle) the arguments in favour of disclosure must outweigh those in favour of preserving privacy and the interests of the data subject.
25. The Commissioner accepts that there is a legitimate public interest in knowing the cost to the taxpayer of the pension of senior council officials.
26. The Commissioner recognises that there may be circumstances when it would be justifiable to disclose information relating to the departure of a senior member of staff, where the disclosure is a necessity for a legitimate interest of the public without causing unwarranted interference to the rights, freedoms and legitimate interests of the data subject.

27. However, the Commissioner does not consider that disclosure is justifiable in this case for the following reasons.
28. The public authority has disclosed details of the Local Government Pension Scheme and the salary banding for the post concerned. Thus the Commissioner does not consider the disclosure a necessity to fulfil the legitimate interest of knowing how public money is spent on pensions, as the information is already available.
29. The Commissioner does not consider that any remaining public interest served by disclosure of the employee's exact annual pension and lump sum payment outweighs the employee's right to privacy. The Commissioner therefore accepts that disclosure of this information would contravene the requirements of the first data protection principle constituting an unwarranted interference with the employee's privacy.
30. The Commissioner also noted the Tribunal's decision in *Waugh v The Information Commission and Doncaster College (EA/2008/0038)*. This case dealt with the departure of senior staff where a compromise agreement had been reached. In this case the College carried out an investigation into the behaviour of its then principal. The Tribunal took into account the fact that the ex-principal had not actively put details of his departure into the public domain. It also noted the decision in *House of Commons v The Information Commissioner and Norman Baker MP (EA/2006/0015)*, which recognised that a "distinction can be drawn between information relating to public and private lives when considering the disclosure of personal data relating to public officials."
31. Further, the Tribunal noted and applied the comments by Lord Hope in *Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550* (paragraph 7) which concerned the equivalent exemption in the Freedom of Information (Scotland) Act 2002 (FOISA): "In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes [to] the provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data ..."
32. Taking these things into account, in conjunction with the "banding" information provided (in line with the ICO's guidance) the Commissioner is satisfied that the information requested was correctly withheld by the public authority under section 40(2) of the Act.

## The Decision

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33. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

The public authority was correct to withhold the information by applying the exemption under section 40(2) of the Act.

### **Steps Required**

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34. The Commissioner requires no steps to be taken.

## Right of Appeal

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35. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 3<sup>rd</sup> day of August 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Personal information

**Section 40(1)** provides that –

“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.”

**Section 40(2)** provides that –

“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.”

**Section 40(3)** provides that –

“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.”

**Section 40(4)** provides that –

“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).”

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”



**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

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.

**The first data protection principle** provides –

“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.”