

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 October 2010

Public Authority: Buckinghamshire County Council
Address: County Hall
Walton Street
Aylesbury
Buckinghamshire
HP20 1UU

Summary

The complainant requested the names of councillors who were members of the Local Government Pension Scheme (LGPS) but the request was refused by Buckinghamshire County Council (BCC) because the information was exempt under section 40(2) of the Act. The decision was upheld following internal review. During the Commissioner's investigation, five of the councillors who were members of the LGPS gave consent for their names to be disclosed. With regard to the names of the remaining ten councillors who were members, the Commissioner has decided that BCC was not entitled to rely on section 40(2) of the Act to withhold their names.

The Commissioner's Role

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.

Background

2. This request sought the names of councillors who were members of the LGPS. The LGPS is available to all councillors and elected mayors of an English county council, district council or London borough council or of a Welsh county council or county borough council who are offered

membership of the Scheme under the council's scheme of allowances and who are under age 75.

3. In response to the Commissioner's enquiries, the BCC advised the statutory basis on which elected councillors can join the LGPS is section 99 of the Local Government Act 2000 brought into force by the Local Government Pension Scheme (Amendment) Regulation 2003 [SI 2003 No. 1022]. Further information about the scheme and how it applies to eligible councillors is available at the website for Local Government Employers (<http://www.lge.gov.uk/lge/core/page.do?pageId=119602>).

The Request

4. On 27 November 2008, following the satisfactory conclusion of an initial information request to BCC about the contributions for councillors paid into the LGPS, the complainant made a further information request in the following terms:

Could you please let me know the names of the 14 councillors in the scheme?

5. This request was taken to mean the names of the 14 councillors in the scheme in the financial year 2007/8. In response to the earlier information request, BCC had disclosed that 14 councillors were members of the scheme and that the total employer contribution for these members in that year was £57,323, with an approximate county councillor contribution of £15,477 for the same period. With regard to the present request for the names of those councillors, BCC responded on 3 December 2008 and refused to disclose the information because it was exempt under section 40(2) of the Act.
6. The complainant requested an internal review on the same date. The results were sent to him in a letter dated 15 January 2009 and upheld the original decision, including the exemption cited previously.

The Investigation

Scope of the case

7. On 6 February 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked why the public could not know the names of the

councillors who were in receipt of pensions. In the complainant's view the councillors were not ordinary employees with confidentiality rights but representatives of the public who were paying their allowances.

Chronology

8. The Commissioner wrote to the complainant on 10 July 2009 to explain his complaint was under substantive investigation. On the same date the Commissioner wrote to BCC to ask a number of questions about the way the information request had been handled. These enquiries included a request for contextual information about the basis on which councillors could join the LGPS as well as a number of other questions. Further detail was sought to support BCC's claims that releasing the requested information could enable calculation of individual pension contributions and future benefits and that the withheld information could also be the personal data of other people apart from the councillors themselves. In addition, BCC was asked whether the councillors' consent had been sought to disclose their names and for clarification about the councillors' expectations as to whether their involvement in the scheme would be kept private. Finally, BCC was also asked about its general policy on publicising the pension benefits of senior employees. On the last question, the Information Commissioner noted this practice was fairly widespread in the public sector.
9. BCC responded on 13 July 2009 to ask for examples of where public sector pension benefits were made public and the Commissioner provided further information on this point on 21 July 2009. BCC responded substantively to the Commissioner's enquiries on 18 August 2009. Confirmation was given in the response that all of the councillors involved had been approached for their consent to make their names public. One had given consent and another had given "qualified" consent.
10. The Commissioner contacted BCC on 23 September 2009 and stated his provisional view was that the names of the councillors should be released. The Commissioner set out the main points that led him to reach this view and gave BCC the opportunity to make any further comments, including any from the councillors concerned. In addition, the Commissioner asked to be notified when the name of the councillor who had given consent was disclosed to the complainant.
11. BCC responded on 27 October 2009 and advised that including the councillor who had previously given consent, a total of five councillors had now given consent for their names to be disclosed to the complainant. On 26 November 2009, BCC emailed the complainant

and disclosed the names of the five councillors who had given consent to the disclosure of their names. In addition, BCC used the message to clarify that while it had originally advised the complainant that 14 councillors were members of the scheme in the financial year 2007/8 this was an error. Thirteen councillors had been members at the start of the financial year and two more had joined during the course of the year. The message was copied to the Commissioner.

Analysis

Exemptions

Section 40(2): Personal information relating to third parties

12. The exemption under section 40(2) of the Act applies to information that is the personal data of an individual other than the applicant and where disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA). The DPA 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 Commissioner notes that the withheld information in this case is the names of the councillors who were members of the LGPS in the financial year 2007/8 and who have not given consent to the disclosure of their names. The Commissioner is satisfied the withheld information is personal data relating to these councillors.
14. The Commissioner considers the relevant data protection principle in this case is the first data protection principle as set out in Schedule 1 to the DPA. The first data protection principle states that personal data shall be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met.

Would it be unfair to disclose the information?

15. In considering whether disclosure of the withheld information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- whether the individuals specifically refused consent to the disclosure of the requested information
- the individuals' reasonable expectations of what would happen to their personal data
- whether disclosure would be likely to cause any unnecessary or unjustified damage or distress to the individuals.

In the Commissioner's view, while the second and third of these factors are the main ones to take into account when considering fairness all of these factors need to be balanced against the legitimate interests of the public in knowing the names of the councillors.

16. On the question of consent, the first of the factors listed above, the Commissioner's view is that the expression of a refusal to consent is not absolutely determinative in the decision as to whether the data subject's personal data will be disclosed. Where the data subject consents to the disclosure of their personal data within the time for statutory compliance with the request, then this disclosure will generally be fair and will also satisfy Schedule 2, condition 1.

17. However, in all other circumstances, the Commissioner will take the data subject's comments into account insofar as they represent an expression of the views of the data subject at the time of the request had the data subject given any thought to the issue at that time. These views help to inform the analysis of fairness.

18. As described at paragraph 9 above, consent was only sought from the councillors as a result of the enquiries the Commissioner made while investigating the complaint. Eventually, five councillors gave their consent and their names were disclosed to the complainant. Ten councillors withheld consent.

19. In his enquiry dated 10 July 2009 the Commissioner addressed a specific question to BCC about the councillors' reasonable expectations of what would happen to their personal data concerning their participation in the LGPS. In response, BCC stated councillors had never been specifically warned there was a possibility their participation would be made public. Historically, BCC had not published details of LGPS participation despite publishing details of all

of the other allowances paid to councillors. In BCC's view this distinction in what was published might reflect a qualitative difference between the Council's dual roles as local authority on the one hand and administering authority for the LGPS on the other. BCC noted the Commissioner had been unable to provide any examples of LGPS participation/pension contributions being disclosed by other local authorities, as opposed to other public sector bodies. Taking all of these factors together, BCC concluded the councillors concerned could have had a reasonable expectation their participation in the LGPS would be kept private.

20. The Commissioner has considered the arguments BCC has put forward about the councillors' reasonable expectations about the disclosure of their participation in the LGPS. The Commissioner notes that central to BCC's argument is the absence of examples from the local government sector where similar information is routinely disclosed. The Commissioner is not persuaded by this argument. The Commissioner provided BCC with examples of where pensions information is routinely disclosed, including by his own Office in relation to the Commissioner himself and all members of his senior management team. In the Commissioner's view the absence of readily available examples of disclosure from the local government sector suggests that sector is lagging behind best practice in other parts of the public sector and it does not justify a continuing refusal to disclose such information in the future.
21. The Commissioner's 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. Page 8 of the guidance states that:

'Whether the information relates to an individual's public life (i.e. their work as a public official or employee), or their private life (i.e. their home, family social life or finances). Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position and whether they have a public facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (e.g. the official's family).'

22. In the present case, when reading this guidance, it is necessary to replace the idea of seniority with the idea that the councillors concerned are publicly elected officials who derive pension benefits by virtue of their office, which are met from public funds. If this reasonable substitution is made then it is less likely that the disclosure of the requested information will be unwarranted or unfair.
23. As noted at paragraph 19, in response to the Commissioner's enquiries BCC noted it publishes details of all other allowances paid to its councillors. The only exception concerns participation in the LGPS by virtue of holding office as a councillor. BCC argued that as a consequence of its established policy of publishing allowances but not membership of the LGPS councillors had a reasonable expectation that their membership of the LGPS would not be made public.
24. However, in the Commissioner's view, the distinction is an artificial one. In both cases the benefit to councillors is paid from public funds and it is accepted the benefit received in terms of allowances paid from public funds should be disclosed in the interests of transparency. In the Commissioner's view the same principle should apply to the benefit they receive through membership of the LGPS. Furthermore, there is no suggestion that disclosure of the requested information would put the councillors concerned at risk or would reveal details of the private lives of other people, such as their families.
25. On this last point, the Commissioner notes that in its internal review letter, BCC postulated the requested information was not only the personal data of the councillors involved but was also arguably the personal data of other people, namely the councillors' potential beneficiaries. The Commissioner notes that BCC had rowed back from this position by the time it wrote to him on 18 August 2009 and stated that it did not now consider the requested information to be the personal information of the potential beneficiaries. The Commissioner agrees with BCC's later view in this regard.
26. Whether councillors' allowances and their membership of the LGPS should both be published or should be treated differently can be considered in another way. Publishing the names of those who chose to join the LGPS can be said to reveal information about their personal rather than their public lives. This is because a councillor's allowance is an entitlement whereas choosing to join the LGPS is a personal decision. It reveals information about their private lives as it confirms they are making financial provision for their future and also confirms their current income is being reduced by the amount of any contribution into the scheme.

27. The Commissioner has carefully considered this alternative argument and accepts there is personal choice in the decision to join the LGPS but notes the same applies to the allowances paid to councillors. A councillor can choose to accept an allowance or can decline it. In choosing to accept an allowance the councillor receives a benefit paid from public funds. As BCC publishes the allowances paid to councillors the public will know a particular councillor has made a personal decision to benefit from public funds by the amount of the annual allowance. In the Commissioner's view this is analogous to the position concerning membership of the LGPS in terms of the type of personal information it reveals. The difference in terms of BCC's established practice is the public does not know which councillors have made a personal decision to join the LGPS and consequently receive a benefit from public funds. As noted at paragraph 24, to the extent that there is a difference between the two scenarios the Commissioner believes the distinction is an artificial one.
28. The Commissioner has examined carefully all of the arguments that BCC has advanced, both in its own right and those which it has quoted from the councillors covered by this request. A number of the councillors referred to their privacy and saw disclosure as an intrusion into their privacy. However, having considered these comments and the other arguments advanced by BCC the Commissioner has not found any evidence to support a view that disclosing the requested information would be likely to cause unnecessary or unjustified damage or distress to the individuals concerned.

Would it be unlawful to disclose the information?

29. Having decided that disclosure of the councillors' names would not be unfair, the Commissioner has gone on to consider whether the processing would be lawful. In this case, the Commissioner is not aware of any duty of confidence or statutory bar protecting the information and he is satisfied that the disclosure would not be unlawful.

Schedule 2 Conditions

30. The sixth condition provides that

"personal data shall be processed in accordance with the rights of the data subjects under this Act".

31. It establishes a three part test that 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 and legitimate interests of the data subject.
32. The Commissioner believes there is a legitimate interest in all public authorities being as open and transparent as possible and there is a general public interest in knowing how public money is spent, particularly when it gives rise to a personal benefit for an elected official such as a pension. The Commissioner believes that disclosure of the requested information is necessary to meet that legitimate interest.
33. Having already established that the processing is indeed fair, the Commissioner is also satisfied that the release of the councillors' names would not cause any unwarranted interference with their rights, freedoms and legitimate interests as data subjects. The Commissioner is satisfied the requested information relates primarily to the councillors' public lives and does not intrude significantly on their private and family lives. Furthermore, there is no evidence to suggest that disclosure would compromise their personal safety or otherwise be likely to cause unwarranted interference (or prejudice) to their rights, freedoms and legitimate interests.

Procedural Requirements

34. Section 1(1) of the Act provides that:

"Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

35. Section 10(1) of the Act provides that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

The Decision

36. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act, in that:
- it wrongly withheld information under section 40(2) thus breaching section 1(1)(b) and section 10(1) of the Act.

Steps Required

37. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- to provide the complainant with the list of names of the ten councillors who were members of the LGPS in the financial year 2007/8 and who have not given their consent previously for their names to be disclosed.
38. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

39. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

40. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: 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 14th day of October 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

1 General right of access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority—
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information—
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

10 Time for compliance with request

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
- (2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period

beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

“the date of receipt” means—

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

40 Personal information

(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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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).
- (5) 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) the 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 [1998 c. 29.] 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 [1998 c. 29.] 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).
- (6) 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 [1998 c. 29.] Data Protection Act 1998 shall be disregarded.
- (7) In this section—
- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] 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.