

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 April 2010

Public Authority: The Common Council
City of London Corporation

Address: PO Box 270
Guildhall
London
EC2P 2EJ

Summary

The complainant requested the amounts paid to Assistant Directors and above from the public authority's Department of Community and Children's Service in severance and/or redundancy packages in five financial years. He asked for the information to be anonymised. The public authority explained that it had paid money in two of the five years to one individual in each year. However, it explained that it could not provide the amount paid as it was unable to anonymise the data. This was because the information in any form remained the personal data of those individuals and the information was therefore exempt by virtue of section 40(2). The Commissioner has considered the application of section 40(2) in this case and has determined that it was correct. He therefore dismisses the complaint and requires no remedial steps to be taken.

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. Paragraph 9 of Schedule 1 of the Act provides that the Common Council of the City of London is a public authority in respect of information held in its capacity as a local authority, police authority or port health authority. In this case the relevant information is held in its capacity as local authority.
3. The City of London is the local authority for only the 'square mile' in London. This area constitutes the historic City of London.

The Request

4. On 16 December 2009 the complainant requested the following information in accordance with section 1(1) of the Act:

'How much severance pay/redundancy pay has been paid to Senior Officers employed by the City of London Corporation (ie Assistant Director and equivalent and above) in the Department of Community and Childrens [sic] Services (including Housing and Sports Development) in financial years, 2005/6, 2006/7, 2007/8, 2008/9, 2009/10? You should be able to provide this information in a format which would not allow me to identify any individuals.'

5. On 18 January 2009 the public authority issued its response. It explained that it held no relevant recorded information for the years 2006/7, 2007/8 or 2008/9. However, there were cases in 2005/6 and 2009/10. It explained that the number was very small and it believed that the disclosure of the information would be the release of personal information about identifiable individuals. This is because the information concerns a small number of staff in a small authority. It explained that it had considered whether disclosure could compromise an individual's privacy and whether it would be unfair or unwarranted. It explained in this case it believed section 40(2) could be applied to the data. It also explained the area in which it was a local authority and provided its details of where the complainant could request an internal review.
6. On 31 January 2010 the complainant requested an internal review. He explained that he had asked for the information in a non-attributable form and this should have led to the information being released.

7. On 2 February 2010 the public authority communicated the results of its internal review. It explained that it upheld its position and that it believed that the numbers were so low as to engage the section 40(2) exemption. It explained its view by stating that there was only one individual for each year concerned and that the low numbers could be cross referenced with other data to identify the individuals in question.

The Investigation

Scope of the case

8. Later on 2 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following point:
 - *That he did not believe that other evidence in the public domain would enable the other individuals to be identified.*
9. On 9 April 2010 the complainant confirmed to the Commissioner that the scope of his investigation was:
 - *To determine whether the amounts paid to two individuals (without their names) would be exempt by virtue of section 40(2) [third party personal data] or whether this information should be disclosed to the public.*

Chronology

10. On 12 February 2010 the Commissioner wrote to the public authority. He asked for the withheld information and for further arguments about why it had been withheld.
11. On 5 March 2010 the public authority provided the Commissioner with the withheld information and explained why it had withheld it.
12. On 11 March 2010 the Commissioner wrote to the complainant. He tried to set the scope of his investigation and explained his preliminary verdict in this case. He asked the complainant whether he wished this investigation to continue.
13. On 29 March 2010 the complainant replied to the Commissioner and asked him to issue a formal decision.

14. On 30 March 2010 the Commissioner replied to ask the complainant to confirm the scope of the case and provide any further arguments that he wished the Commissioner to take into account.
15. Also on 30 March 2010 the Commissioner telephoned the public authority to make final enquiries for his Decision Notice.
16. On 1 April 2010 the public authority acknowledged the Commissioner's enquiries and on 8 April 2010 it answered them.
17. On 9 April 2010 the complainant replied to the Commissioner. He confirmed the scope of the investigation and explained that he believed the information was truly anonymous. He stated that even if it was not the Commissioner should consider carefully that the money was paid out of public funds and that the contract/severance agreement should be considered carefully by the Commissioner to ensure that the reasonable expectations were of privacy. On 12 April 2010 the Commissioner acknowledged receipt of this response.
18. Also on 9 April 2010 the Commissioner made further enquiries to the public authority about the response he received on 8 April 2010. He received a response on 19 April 2010.

Analysis

Section 40(2)

19. The public authority has argued that disclosure of the annual amounts would involve disclosing the personal data of individuals because the sample was so small that it meant that these individuals could be identified. It then stated that it believed that it would contravene one of the data protection principles of the Data Protection Act 1998 ("DPA"). As such it would be exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i). Section 40 is set out in full in a Legal Annex to this notice.
20. The complainant has argued that it should not be possible to identify individuals as he wants the information to be anonymised. He explained that this would make individuals unidentifiable and that the amounts would not constitute personal data. In the alternative he argued that the information that would be required to link the information to the individuals was not in the public domain and therefore the information was not personal data.

21. The public authority's main arguments centred on the application of the first data protection principle. It believes that disclosure of the personal data in question would be unfair and would not satisfy one of the conditions for processing listed in Schedule 2 of DPA. These arguments are considered in more detail below.
22. It is important to note that any disclosure under this Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed that, "*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*" (paragraph 52):
http://www.informationtribunal.gov.uk/Documents/decisions/guardian_news_HBrooke_v_infocomm.pdf.
23. In analysing the application of section 40(2), the Commissioner therefore considered a) whether the information in question was personal data and b) whether disclosure of the personal data under the Act would contravene the first data protection principle.

Is the information personal data?

24. The information consists of two amounts of money that had been paid out to individual former employees without their names. One was paid to an individual in 2005/2006 and one in 2009/2010.
25. Personal data is defined in section 1 of DPA as data
"which relate to a living individual who can be identified from those data or those and other information in the possession of or which is likely to come into the possession of the data controller and includes expressions of opinions about the individual and indications of the intentions of any other person in respect of that individual".
26. In this case whether the amounts would be the personal data of any living individual was contentious and the arguments of each side were considered in detail by the Commissioner.
27. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "Determining what is personal data" which can be accessed at:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

28. From his guidance there are two questions that need to be answered in the affirmative when deciding whether the information if disclosed to the public would constitute the personal data of individuals:
- (i) *Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?*
 - (ii) *Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?*
29. It is clear that the amount paid on severance/redundancy, if linked to identifiable individuals, is the personal data of those individuals. The question to be determined is whether a living individual can be identified from that data if the information is disclosed to the public.
30. The Commissioner considers that truly anonymised data is not personal data and there would be no need to consider the application of the data protection principles. The Commissioner considers that even where the data controller holds the additional 'identifying' information, this does not prevent them from anonymising that information to the extent that it would not be possible to identify any living individual from that information alone and thus it would no longer be personal data when released. The test of whether information is truly anonymised is whether a member of the public could identify the individuals by cross-referencing the data with information or knowledge already available to the public. This approach is supported by paragraphs 24 and 25 of Lord Hope's judgement in the House of Lords' case of the Common Services Agency v Scottish Information Commissioner (2008) UKHL 47,
- "..Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection."*
31. The Commissioner does not consider that the withheld information in this case to be truly anonymous. The reason for this is that the breakdown asked for is of very small individual numbers (one in each year) and within the limited population of individuals (former Assistant Directors or higher) of a small public authority. Therefore revealing the amount paid to an individual upon leaving the public authority is likely

to reveal information that can be tied to specific individuals and would therefore constitute a release of personal data. He notes that the public includes individuals with considerable knowledge of the authority and also a section of the public includes individuals who are employed by the authority. These individuals are likely to be able to tie the set amounts to individuals with little problem.

32. The Commissioner has no reason not to believe that the individuals are alive and the information is therefore about living individuals.
33. In the light of the above, the Commissioner is therefore satisfied that the amounts paid to the individuals are those individuals' personal data even without their names. He is also satisfied that there is no way that this information can be anonymised and not be personal information on the circumstances of this case.
34. Had the public authority not confirmed how many individuals left in each year in its internal review then the Commissioner believes there would have been more scope for potential anonymity in relation to aggregate amounts that may or may not have related to more than one individual. However, he would still not believe that the amounts paid to each individual could have been anonymised. The Commissioner has then moved to consider whether disclosure would contravene the first data protection principle.

Would disclosure contravene the first data protection principle?

35. The first data protection principle has two main components. These are as follows:
 - A requirement to process all personal data fairly and lawfully;
 - A requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data;
36. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair and lawful?

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

- The individuals' reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
 - The existence of severance/redundancy agreements and the clauses within them;
 - The seniority of the individual staff and whether their expectations would change due to this seniority;
 - Whether disclosure would cause any unnecessary or unjustified damage to the individuals; and
 - Legitimate interests of the public in knowing the amounts of public money being spent by the public authority.
38. The Commissioner has considered each severance/redundancy agreement in detail and believes that there are sufficient differences to warrant dealing with each amount separately:

The amount paid in 2006-2007

39. The public authority stated that disclosure of the withheld information would be unfair to the data subject. It does not think that the data subject would have had a reasonable expectation of the withheld information being released in this case. Instead there was an expectation of confidentiality and privacy especially given that both the public authority and the employee has undertaken to keep this information confidential as part of the severance/redundancy agreements. The Commissioner has looked at the relevant parts of the severance/redundancy agreement. He notes that this one provides specific confidentiality clauses that impose the obligation of confidentiality on both the public authority and the individual. The Commissioner has been satisfied that the reasonable expectation of the data subject is a persuasive factor in indicating that the release of this information would be unfair.
40. The Commissioner believes that severance/redundancy agreements play an important role in employer/employee relationships. They avoid the time, expense and stress of litigation in an Employment Tribunal when an employer/employee relationship comes to an end. Such agreements provide the opportunity to conclude the relationship in private and allow both parties to make a fresh start if they so choose. The Employment Rights Act 1996 established the opportunity for parties to reach such an agreement and has built safeguards into the process to ensure employees receive independent and accountable

legal advice before entering into such agreements. Details of any payment(s) made are included in the agreement.

41. The Commissioner also believes that the right to access official information and the ability to reach an equitable compromise when an employer/employee relationship comes to an end are not mutually exclusive. However, where a written agreement has been reached between a public authority and its senior employee, a balance has to be struck between a public authority's duty to be transparent and accountable about how and why it decided to spend public money in a particular way, and its duty to respect its employees' reasonable expectations of privacy. In this case for the reasons in paragraph 39 above the employees' reasonable expectations of privacy are clear.
42. The Information Commissioner's Office has produced Awareness Guidance on section 40 of the Act, which makes it clear that public authorities should take into account the seniority of employees when personal information about their staff is requested under the Act. However, the Commissioner also considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information may relate to an employee's professional life, as well as their personal life.
43. The Commissioner's guidance "The Exemption for Personal Information" (version 3 11 November 2008) on the application of 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 lives. Although the guidance acknowledges that there are no hard and fast rules it states that:

"Whether the information relates to the 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)."

44. Furthermore, the Information Tribunal in *Rob Waugh v Information Commissioner and Doncaster College* (EA/2008/0038) considered similar conditions and the considerations are relevant in this case. The Tribunal, in considering the concept of fairness under the first Data Protection Principle, held that it was;

"necessary to consider in terms of fairness what would be [the data subject's] reasonable expectations about the use and subsequent release of the material".

45. As in the current case, in EA/2008/0038, the settlement agreement between the public authority and the data subject included a confidentiality agreement which limited the information that would be made available to the public about the termination of his employment. The Tribunal held that this gave rise to;

"a reasonable expectation that no further information would be released".

46. Following the decision in the *House of Commons v Information Commissioner and Norman Baker* (EA/2006/0015 and 0016), the Tribunal concluded that the legitimate interests of the public in accessing the requested information were not sufficient to outweigh the data subject's right to privacy, particularly given the substantial detriment that would result from disclosure.

47. The Commissioner has also considered whether it felt that the release of the information would cause unnecessary or unjustified damage and distress to the individual involved. Having considered the nature of the information and the expectations as noted above, the Commissioner is satisfied that the release of it could potentially cause unnecessary and unjustified damage and/or distress to the individual in this case. He has considered carefully the circumstances that led to the payments and the withheld information itself in coming to this conclusion.

48. In finally considering the legitimate interests of the public, the Commissioner notes there is a real public interest in knowing how much money has been spent by the public authority particularly where the employees' services are no longer thought necessary. In addition, the Commissioner has considered that the public authority was bound at the date of the request by a Statement of Recommended Practice (a SORP) issued by the Chartered Institute of Public Finance and Accountancy (CIPFA). This required the public authority to release some anonymous information in its accounts where large payments place the individual concerned within specified remuneration bands. In this case the amount of money paid was insufficient; however, the

CIPFA requirements go some way to addressing the public interest in knowing about large payments although not assisting accountability in this case.

49. He appreciates that for smaller amounts there remains some public interest in knowing the amount of public money that has been spent by the public authority in making people redundant or otherwise ending their employment. Against these arguments he must also consider that there is a considerable legitimate interest of the public in enabling public authorities to bring the employment of members of staff to an end in an economically efficient and proportionate manner that counteracts the need of the public to know the amounts paid. He has in paragraph 34 considered whether there was any way to bring accountability without revealing personal data and has determined that there is not in this case. He has decided that the legitimate interests of the public in disclosure, in the circumstances of this case, do not outweigh the data subject's right to privacy.
50. Overall the Commissioner concludes that the information requested in the present case is sufficiently similar to that in EA/2008/0038, and other similar decisions taken by the Commissioner, to justify the same conclusion being reached here.
51. Therefore when considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subject. The central reason for this conclusion is that the legitimate expectations of the individual are that the information would not be provided and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
52. In addition, the Commissioner also believes that the unilateral breach of the confidentiality terms in the severance/redundancy agreement would also be unlawful. This fact alone would also mean the exemption was applied correctly.
53. The Commissioner therefore upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)].

The amount paid in 2009/2010

54. The Commissioner has considered the second severance/redundancy agreement and notes that it is less broad and does not provide an express confidentiality clause that covers this eventuality, although the

way that it is worded and its context still shows that the reasonable expectations of the data subject would be that this information would not be disclosed. The whole agreement is marked confidential and the public authority has confirmed to the Commissioner that it has treated this information in this way and believes that it is obliged to do so. It confirmed that the details of any payment(s) made are included in the agreement.

55. The Commissioner accepts that the reasonable expectation of the data subject in this case would be that the figure would not be released. He believes that this expectation is reinforced in this case by it being contemporary information about an individual's current financial circumstances. He notes that this information has the potential to undermine an agreement that was made in good faith (in line with paragraphs 39 to 41 above). He notes that this information is analogous to HR information (paragraphs 42 to 46 above) and that this outweighs, in all the circumstances, the public's legitimate interest in knowing the exact figure (paragraphs 48 and 49 above). He notes that the provision of the information also has the potential to cause unnecessary or unjustified damage and distress to the individual involved (paragraph 47 above).
56. He has therefore determined that the disclosure of the requested information would be unfair to the data subject. The central reason for this conclusion is that the legitimate expectations of the individual are that the information would not be provided and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
57. The Commissioner therefore upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)].

The Decision

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

Steps Required

59. The Commissioner requires no steps to be taken.

Right of Appeal

60. 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 sent.

Dated the 28th day of April 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

The Freedom of Information Act 2000

Section 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.

Section 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.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(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, or

(d)

does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- "data controller" means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- "data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- "data subject" means an individual who is the subject of personal data;
- "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;

- "processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a)

organisation, adaptation or alteration of the information or data,

(b)

retrieval, consultation or use of the information or data,

(c)

disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d)

alignment, combination, blocking, erasure or destruction of the information or data;

- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

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

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.