

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 3 January 2007

Public Authority: Braintree District Council
Address: Causeway House
Braintree
Essex
CM7 9HB

Summary

The complainant made a request for a list of addresses of council properties owned by the public authority. This was refused under section 40 of the Act on the grounds that the information in question constituted personal data of which the applicant was not the subject and that disclosure of that information would constitute a breach of one of the data protection principles. The Commissioner considers that no such breach would occur and that it was not correct, therefore to rely upon the exemption. The Commissioner also considers that in its responses to the complainant, the Council incorrectly applied the section 38 (Health and safety) exemption and breached section 17 of the Act.

In the light of the above, the Commissioner requires the Council to provide the complainant with the requested information within 35 calendar days of the date of this notice.

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.

The Request

2. On 26 January 2005 the complainant requested the following information from the public authority in accordance with section 1 of the Act:

- 2.1 "A summary of the total number of properties currently held in ownership by the Council and those that could be reasonably described as Council Housing Stock"
- 2.2 "Can you please supply me with a list of the property addresses and identify which of those properties are either houses, flats/maisonettes or other".
3. On 14 February 2005 the Council provided the complainant with the information described in section 2.1 above.
4. At the same time, the Council refused to release the information requested in section 2.2 stating "We consider this to be personal information covered by the Data Protection Act, and the second data principle does not allow data to be processed for purposes other than those for which it was collected".
5. The complainant wrote to the Council on 18 February 2005, stating that he did not agree that this information constituted personal data and requesting an appeal of the Council's decision.
6. The Council wrote again to the complainant on 24 February 2005 confirming that section 40 of the Act applied and advising that the appeal would be considered by another individual.
7. The same individual wrote again on 22 March 2005 adding the section 38 (Health and safety) exemption of the Act to the initial decision and confirming non-disclosure for their earlier reasons. They also then advised the complainant to contact the Commissioner directly "if you wish to appeal against the decision itself".

The Investigation

Scope of the case

8. On 4 March 2005 the complainant contacted the Commissioner disputing the Council's decision that the information requested constituted personal data. Subsequently, the Council added the health and safety exemption to its reasons for non-disclosure. The Commissioner's investigation focussed upon these substantive issues. In addition, as a result of the investigation, consideration has been given to the Council's process for handling the review of their original decision. Although this matter does not form a part of the decision which the Commissioner is required to make under section 50 of the Act, it is of concern to him and his conclusions are set out in the section headed "Other Matters".

Chronology

9. The Council believe the request was for exempt personal data that would have to be processed in a manner incompatible with the purpose for which it was obtained. In their letter of 24 February 2005 they argued that although the

- information requested did not contain a name, it could still be considered to be personal data under the terms of the Data Protection Act 1998. This was because of the availability of other information such as the public electoral roll which when combined with the requested information could identify living individuals. They advised from the outset that they would only consider release if they knew what the complainant wanted to do with the information.
10. Subsequently, in its letter of 22 March 2005, the Council cited the protection of “vulnerable” tenants as their reason for applying the section 38 exemption. They went on to express generic concerns about the effect of redaction of these addresses, believing that editing the list may well draw attention to the exclusions themselves.
 11. The complainant disputed that the information requested constituted personal data, claiming instead that it related to Council owned assets. He argued that since the list of addresses originated with them and had not been provided to the Council by any individual, they were not processing personal data. In addition, he correctly stated that the Act was purpose blind. The complainant was however prepared to accept that should the Council agree to release the information, they could redact the addresses of certain “vulnerable” tenants, such as the elderly.
 12. Following enquiries from the Council, on 30 January 2006, the case officer advised the public authority that to ensure consistency, work on this case would be temporarily suspended whilst the Information Commissioner's Office considered a similar case which would have a bearing on this decision.
 13. During a telephone conversation on 3 July 2006, the Council acknowledged that the Mid-Devon Decision Notice (FS50082890) had been useful in dealing with a similar council housing request. However, they reiterated their position of not wanting to release the information without knowing the purpose for which it would be used, and repeated their reliance on section 40 and a breach of the second data protection principle. The case officer pointed out the relevant parts of the Mid-Devon Notice (notably section 5.3 onwards) and advised that the Commissioner was more concerned with the first principle.
 14. The complainant has made identical requests to a number of other councils and provided a list to the Commissioner of those who have released the information. On 5 July 2006, following enquiries which confirmed the release by two of these other councils, the case officer forwarded this list to Braintree District Council. In a final attempt to achieve informal resolution, the Council were invited to consult with these public authorities regarding their decisions and any subsequent effects, and to consider therefore whether to review their own decision.
 15. Further correspondence with the Council concerning issues raised by this case, the Mid-Devon case and a similar request that had been resolved by the public authority took place on 12 July, 25 July and 4 August. The case officer reiterated the advice that the Commissioner did not consider the second principle relevant and that he was more concerned with the first. Braintree District Council repeated their view that they must understand the purpose for which the information is required and put conditions on its re-use. Consequently, they continued to

withhold the information requested on the basis that not doing so would contravene the second data protection principle.

Analysis

16. Throughout the course of this investigation, both parties have remained convinced of their own points of view and despite a number of attempts, this has restricted the opportunities for informal resolution.

Procedural matters

Section 17 – Refusal of request

17. In its letter of 14 February 2005 refusing to release the information requested the Council failed to explain why that information actually was personal information as defined by section 40, although it did elaborate further in its letter of 24 February. The Council then correctly proceeded to consider the data protection principles and in particular principle 2. However, the Commissioner believes there is insufficient explanation of these considerations in this document. Further, in the same refusal letter, the Council failed to give details of either its internal complaints procedure or the complainant's right of appeal to this office, although once again subsequent letters did give some advice on these matters.
18. In addition, the Commissioner is concerned that the Council having applied section 38, a qualified exemption, failed in its duty under section 17(3)(b) to explain how the public interest in maintaining the exemption outweighed that in disclosing the information.

Exemptions

Section 38 – Health and safety

19. Following a review of its original decision not to disclose the information requested, the Council decided to also apply the section 38 exemption.
20. The Council cited the protection of "vulnerable" tenants as their reason for applying this exemption. The complainant was agreeable to having certain of these addresses redacted. The Council expressed generic concerns about the effect of the redaction of these addresses, believing that editing the list may well draw attention to the exclusions themselves, although they did not provide evidence in support of this argument.
21. The Commissioner accepts that the information requested could potentially be used by unscrupulous mailing or cold-calling companies, but believes there is insufficient evidence to suggest that disclosure would or would be likely to endanger the physical health, mental health or safety of an individual.

Section 40 – Personal information

22. The Commissioner is satisfied that the information requested falls within subsection 40(2) of the FOI Act. This creates an absolute exemption (that is one not subject to the public interest test) for information falling within the definition of personal data contained in the Data Protection Act 1998 of which the applicant is not the data subject.
23. Personal data is defined in section 1 of the Data Protection Act 1998 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.”
24. The Commissioner is satisfied that the addresses of occupied Council properties would fall within (a) above when in the possession of the Council. He is also satisfied that some of the addresses may constitute personal data falling within sub-paragraph (b) where that the complainant is able to link addresses of council houses to other records they either already hold or could obtain.
25. However, section 40(3) of the FOI Act provides that the exemption only applies if disclosure would contravene any of the principles defined in Schedule 1 of the Data Protection Act 1998 or section 10 of that Act (Right to prevent processing likely to cause damage or distress.)
26. Although the Commissioner accepts that at least some of the requested information constitutes personal data, he is not satisfied that its disclosure to a member of the public would contravene the data protection principles. He considers that the relevant principle is the first data protection principle although he has considered the potential contravention of the second principle as this was consistently relied upon by the Council.
27. With regards the second principle, the Commissioner does not believe this is relevant as it would effectively bar the release of the majority of third party data requested under the FOI Act on the basis that the data was not originally obtained for that purpose. Given that there is a provision for the release of such data in section 40, the Commissioner considers that this cannot have been the intention of the interface between the two Acts and that the more appropriate test is one of fair and lawful processing (principle 1). Neither does he consider that disclosure of that information in response to a request under section 1 of the FOI Act would constitute processing incompatible with the purpose for which the information was obtained.
28. The first principle provides that:

“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.”

29. There is no suggestion that the information requested by the complainant is “sensitive personal data” as defined in the Act. Schedule 3 of the Act is thus not relevant.
30. In most cases, public authorities are not required to pay regard to the identity or circumstances of an applicant for information. The release of information to the applicant should be regarded, in other words, as the equivalent of disclosure to the world at large. There are however some exceptions. When considering disclosure of personal data against the condition for processing in paragraph 6 of Schedule 2, it is necessary to weigh the legitimate interests of the recipient of information against the rights of data subjects.
31. In considering whether personal data would be processed fairly if it were disclosed to the complainant, the Commissioner has considered whether there would be any unfairness to the subjects of those data. Although he accepts that there would be unfairness to individuals if they were publicly identified as members of a vulnerable group, for instance asylum seekers, benefit recipients or women who have left violent partners, he does not consider that there would be any general unfairness to individuals in being identified as council tenants. In taking this view, he is mindful of the low inherent sensitivity of the data and that in practice the fact that a particular property is or is not owned by the Council will be generally known to neighbours or because it is part of a known council housing estate.
32. The Commissioner is willing to accept that in theory there may be particular properties which are not generally known to be owned by the Council, the disclosure of the addresses of which might result in unfairness to some individuals. If for instance, the Council had housed some vulnerable individuals at a secret location and this fact could be inferred from the address, then the Commissioner would accept that this information could be withheld. The Commissioner has no reason to suppose that this is an issue although recognition of the risk is reflected in the “Steps Required” section of this Notice.
33. Given the low sensitivity of the information requested and the absence of any unfairness to the individuals concerned, the Commissioner is satisfied that any processing of personal data could be carried out in reliance on Condition 6 of Schedule 2. This provides personal data may be processed lawfully if:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

The Decision

34. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the procedural requirements of the Act, specifically in that it failed to comply with sections 17(1)(c), 17(3)(b) and 17(7).
35. In relation to the application of the exemptions relied on by the public authority the Commissioner's decision is as follows:

The information is not exempt information under section 38 (Health and safety).

The information is not exempt under section 40 (Personal information) as disclosure would not contravene any of the data protection principles defined in Schedule 1 of the Data Protection Act 1998.

Steps Required

36. The Commissioner requires the public authority to provide the complainant with the information described in section 2.2 within 35 calendar days of the date of this notice.
37. The Council may exclude from the list of addresses any in respect of which data subjects have exercised their right under section 10 of the Data Protection Act 1998 to object to the disclosure of their personal data. The Council may also exclude from the list any addresses whose disclosure to a member of the public might reasonably be considered likely to cause distress to any resident of those properties. If any such exclusions are made, the Council must give a fresh refusal notice to the complainant, stating the exemptions in the Act upon which it relies.

Other matters

38. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matters:
39. Even though the Commissioner does not consider that the release of the requested information to the complainant would breach any of the data protection principles, he recognises that the Council continues to have some reservations. Therefore, he would not raise any objections to the Council drawing the attention of the complainant to any responsibilities which he may acquire in his own right as a data controller under the Data Protection Act 1998.
40. Following refusal of the request, the complainant appealed the Council's decision on 18 February 2005. In his letter of 24 February 2005, the case officer at the Council advised the complainant of its complaints procedure and indicated that he

would not be the individual who would consider such an appeal. Nevertheless, on 22 March 2005, the same individual wrote again confirming non-disclosure for their earlier reasons and adding the section 38 (Health and safety) exemption to the initial decision.

41. On the matter of complaints procedures, the section 45 Code of Practice states:

57. Where the complaint concerns a request for information under the general right of access, the review should be handled by a person who was not a party to the original decision, where this is practicable. If this is not possible (for example in a very small public authority), the circumstances should be explained to the applicant.

42. The Council are clearly aware of this responsibility under the Code but on this occasion failed to act accordingly. The Commissioner therefore advises that the Council review their relevant policies and procedures to ensure they conform to the Code. He also suggests that the public authority carry out any training necessary to ensure that the appropriate staff are fully aware of these policies and procedures.

Failure to comply

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

Right of Appeal

44. 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@dca.gsi.gov.uk

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 day of January 2007

Signed

**Richard Thomas
Commissioner**

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

Legal Annex

Refusal of request

By virtue of section 17 of the Act, where a public authority is to any extent relying on a claim that any of the exemptions in Part II apply to the request it must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states the facts,
- (b) specifies the exemption in question,
- (c) states (if that would not otherwise be apparent) why the exemption applies,
- (d) contains particulars of any procedures provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (e) contains particulars of the right conferred by section 50 to apply to the Commissioner for a decision as to whether a request for information has been dealt with in accordance with the requirements of Part I of the Act.

Health and safety

38. - (1) Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

Personal information

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

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection

Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

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

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

(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) 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).

(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 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 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.