

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 14 March 2007

Public Authority: British Broadcasting Corporation
Address: MC3 DI
Media Centre
Media Village
201 Wood Lane
London
W12 7TQ

Summary

The complainant requested information about appointments made to the public authority's South West Regional Advisory Council. The public authority withheld information about the ethnic origin of members of the council and about how the decision to appoint to the Council was made. The complainant also believed that information had been withheld about the criteria used when making appointments to this Council. The Commissioner finds that information about the ethnic origin of Council members and notes about each applicant made during the appointment process has been withheld correctly under section 40(2) of the Act. The Commissioner also finds that the public authority failed in its duty to confirm or deny the existence of all information held by it that falls within the scope of the request. As remedial steps have since been taken, the public authority is not required to take further action.

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. The following information request was made on 18 March 2005:

"...who has been appointed **[to the Regional Advisory Council]** in this region, how the candidates were selected and why they succeeded over my application?"

3. The public authority responded to this on 30 March 2005, enclosing information about the South Regional Advisory Council. This included information about the members of the South Regional Advisory Council, but did not include information concerning selection criteria.
4. On 25 April 2005, the complainant contacted the public authority to clarify that he wished to access information about the South West Regional Advisory Council. In this letter, the complainant stated the following:

“You have failed to show how the appointed members succeeded over my application and that part of my request under the Freedom of Information Act remains unfulfilled.”

“Can you provide the names of those who...made the final selection **[for the South West Regional Advisory Council].**”
5. The public authority responded to this request on 18 May 2005. This response provided the complainant with information concerning the reasons for appointing the successful candidates to the South West Regional Advisory Council (the “Council”).
6. With this reply, the public authority provided a grid containing information about the members of the Council. Information about the Council members’ age, occupation, location and ethnic origin had been redacted from the grid. The public authority cited section 40 of the Act as the reason for withholding this information.
7. The complainant replied to the public authority by letter dated 6 June 2005. In this letter, the complainant advised the public authority that he was dissatisfied with the public authority’s response to his information request and enclosed a copy of a letter in which he raised his concerns with the Commissioner.
8. The public authority responded by letter dated 15 June 2005 and advised that it was necessary for the public authority to carry out an internal review of its handling of the request prior to a complaint being made to the Commissioner. The public authority also apologised for not informing the complainant of its internal review procedure previously.
9. The public authority responded giving the outcome of its internal review by letter dated 22 July 2005. This review upheld the decision to withhold information under section 40.

The Investigation

Scope of the case

10. The complainant contacted the Commissioner by letter dated 6 June 2005. In this letter the complainant specified that his complaint related to the withholding of

information about the members of the Council and about the perceived failure by the public authority to provide all relevant information concerning the criteria used when appointing candidates to the Council.

11. The complainant suggested that as the successful candidates had been appointed to “public office”, further information about them should be available. The complainant also believed that he was entitled to further information about the selection criteria used in order that he could compare his application for membership of the Council against those of the successful candidates.
12. Initially, the complainant expressed concern over what he perceived to be a lack of information provided concerning the greater number of women to men included on the Council. This issue was addressed previously by the Commissioner and resulted in further information being provided to the complainant by the public authority. As this issue was informally resolved previously, it has not been considered further in this notice.

Chronology

13. The Commissioner contacted the public authority by letter dated 7 August 2006 in order to notify the public authority about the complaint and address particular issues in respect of the complaint. The public authority was asked to provide any further arguments in relation to its application of section 40 of the Act to the information withheld and to provide a copy of the information withheld under this section.
14. The public authority responded on 4 September 2006. In this letter, the public authority stated that the decision to withhold some of the information about the members of the Council had been reconsidered. As a result, the public authority advised that the complainant would be provided with details of the members' occupations, locations and ages, although this information would be provided in such a way that it would not be possible to link it to individual Council members. The public authority also stated that it would not disclose information regarding the ethnic origin of Council members as in its view this information is exempt under section 40.
15. The public authority stated that the following factors had been taken into account when considering whether section 40 exempted the information requested:
 - How the information was obtained;
 - The likely expectations of the individuals who are the focus of the information regarding the disclosure of it;
 - The effect which disclosure would have on the individual who is the focus of the information
16. The public authority concluded that, based on the above factors, information about the ethnic origin of applicants to the Council should be withheld.
17. After confirming with the public authority that this further information had been

provided to the complainant, the Commissioner contacted the complainant on 2 October 2006. The Commissioner asked the complainant to confirm whether he was satisfied with the information provided and therefore whether he wished to withdraw his complaint.

18. The complainant responded on 16 October 2006. The complainant stated that he did not wish to withdraw his complaint because he still wished to access information about the ethnic origin of the Council members and further that he did not believe that he had been provided with all relevant information concerning the criteria used to select Council members.
19. The Commissioner contacted the complainant further on 19 October 2006. In this letter, the Commissioner asked the complainant for further clarification concerning his complaint about the criteria used for selecting Council members, given that the complainant had been provided with information held by the public authority about this issue previously. In response, the complainant confirmed that he believed that the information previously provided did not constitute all of the relevant information held by the public authority.
20. The Commissioner contacted the public authority again on 19 December 2006. In this letter, it was noted that the wording of the internal review response dated 22 July 2005 suggested that information about how candidates for the Council were selected was withheld, in addition to the information withheld from the membership grid supplied to the complainant. In connection with this, the public authority was asked to respond to the following questions:
 - Was information relating to how the selections to the Council were made withheld?
 - If yes to the above, under which the section of the Act was this information withheld and why is this provision believed to apply?
21. The public authority responded to this on 6 February 2007. In this response, the public authority acknowledged that further information falling within the scope of the request, in the form of notes about each applicant to the Council, had not been identified at the time that the request was made. The public authority confirmed that these notes were considered exempt under section 40. This exemption was considered to apply on the basis of the same factors as cited in the public authority's letter of 4 September 2006, which are listed above at paragraph 15.
22. The public authority referred specifically to the notes relating to the complainant's application to the Council. The public authority considered this to be an application for personal data made under section 7 of the Data Protection Act 1998. The notes about his own application were provided to the complainant.

Findings of fact

23. The public authority has acknowledged that initially it failed to identify all information held that falls within the scope of the request.

24. Notes made concerning each candidate for selection to the Council have been withheld as the public authority considers these exempt under section 40, although those notes relating to the complainant have been provided to him.
25. The public authority believes that information about the ethnic origin of members of the Council should not be disclosed to the complainant on the basis that this information is exempt under section 40. Specifically, the public authority believes that to disclose this information would breach the first data protection principle, which states that personal data shall be processed fairly and lawfully.
26. The public authority also stated that as the information in question is sensitive personal data under section 2(a) of the Data Protection Act 1998, it would be necessary to fulfil a condition from Schedule 3 of the Data Protection Act 1998 in order for this processing to be compliant with the first data protection principle. The public authority does not believe that any of these conditions would be fulfilled if this information was disclosed.
27. The complainant also believes that information concerning the ethnic origin of the Council members should be disclosed as this may have been a factor in the selection of Council members.

Analysis

Procedural matters

Section 1

28. The public authority has acknowledged that initially it failed to identify all information held by it falling within the scope of the information request. The Commissioner finds that the public authority failed to comply with section 1(1) of the Act in that it failed to confirm that information in the form of "*rough notes/informal minutes*" was held by it.

Section 17

29. The public authority has also acknowledged that, when it responded to the information request, it failed to inform the complainant of the internal review procedure or of the complainant's right under section 50 to apply to the Commissioner for a decision. The Commissioner therefore finds that the public authority has failed to comply with the requirement of section 17(7) in this regard.
30. In respect of the information consisting of "*rough notes/informal minutes*", this was not referred to in the response to the information request, dated 18 May 2005. The Commissioner finds that this response failed to comply with the requirement of section 17(1) to state which exemption applies and state the reasons for this.

Exemption

Section 40

31. In considering the application of the section 40(2) exemption to the information requested in this case, the Commissioner has considered whether the requested information constitutes personal data of third parties and if so, whether disclosure would breach any of the Data Protection Principles under the Data Protection Act 1998.
32. The requested information constitutes personal data pertaining to individuals other than the requester and this information could lead to their identification. It therefore does constitute personal data as it relates to identifiable persons. As a result, the information falls within the scope of the exemption provided by section 40(2). Further, as some of this personal data relates to the racial or ethnic origin of the data subjects, this is sensitive personal data as provided by section 2(a) of the Data Protection Act 1998. In this case having established this, it is necessary to consider further whether any of the Data Protection Principles would be breached by disclosure of this information.
33. The BBC argued that the first data protection principle would be breached by disclosure. The Commissioner therefore considered whether the first data protection principle pertaining to the fair and lawful processing applies in this case. The first data protection states 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.

34. In assessing the first data protection principle the Commissioner considered whether the individuals concerned would have an expectation of confidentiality being maintained in respect to the information that they provided concerning ethnic origin and information that had been recorded concerning their suitability for appointment to the Council. When considering this, the Commissioner took into account the representations of the BBC that there would be no expectation on the part of the individuals concerned that this information would be released. Given the sensitivity of some the personal data withheld and the expectation of the individuals concerned that this information would not be disclosed, the Commissioner is satisfied that the individuals would have a legitimate expectation of privacy with respect to this information.
35. The Commissioner also considered the representations of the public authority concerning the fulfilling of a condition for the processing of sensitive personal data contained in Schedule 3 of the Data Protection Act 1998. The Commissioner does not consider that any of the conditions in Schedule 3 can be met.
36. The Commissioner has found that the First Data Protection Principle would be

breached by disclosure of this information. This is because it would not be fair to allow release of the details of an individual's ethnic origin to the general public.

37. Further, the Commissioner considers that it would be neither fair nor lawful to release the information contained in notes making comments about the suitability of the other candidates for the Council. In coming to this decision, the Commissioner recognises that the comments made in these notes are subjective and is mindful of the potential for damage and distress that could be caused by the release of such materials. This could impact on both the author and subject of these materials. The Commissioner also notes that, when the public authority initially responded to the information request on 18 May 2005, the complainant was given a description of the reasons why he was not selected for the Council and why other applications succeeded over his own.
38. Therefore the Commissioner's decision in relation to section 40(2) of the Act is that the public authority has dealt with the complainant's request in accordance with the requirements of Part I of the Act.

The Decision

39. In respect to the application of section 40, the Commissioner finds that the public authority applied this exemption correctly. The Commissioner's decision is that the public authority complied with Part I of the Act in this regard.
40. However, the Commissioner finds that the public authority failed to comply with the requirements of sections 1 and 17, as described above. The Commissioner's decision is that the public authority failed to comply with the Act in this regard.

Steps Required

41. Although the Commissioner finds that the public authority failed to comply with sections 1 and 17, steps have since been taken to remedy these contraventions. Therefore, the Commissioner requires no steps to be taken.

Right of Appeal

42. 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

43. 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 March 2007

Signed

**Richard Thomas
Information Commissioner**

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