

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 November 2007

Public Authority: Legal Services Commission
Address: 85 Gray's Inn Road
London
WC1X 8TX

Summary

The complainant had complained to the public authority about his ex-wife's claim for legal aid in relation to a Family Dispute Resolution Hearing. As a result of this complaint, it was discovered that his ex-wife had been receiving legal aid which she was not eligible for. The certificate was revoked and the complainant informed of this. He then made a request for details regarding the investigation into the matter and whether the public authority had referred it to the police for consideration of prosecution. The public authority refused to provide the details of the outcome of the investigation and chose to neither confirm nor deny whether the matter had been referred to the police. Initially the section 40 exemption was cited for both items but on internal review the public authority chose instead to not confirm or deny whether the matter had been referred to the police on the basis that the section 31(1)(g) and (2)(a) exemption applied. The Commissioner's decision is that the public authority correctly applied the section 40 exemption in both instances and that it was therefore also correct to neither confirm nor deny whether the referral to police was made.

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 10 February 2005, the complainant made the following request:

"... I should be grateful if you would at least notify me when your investigation is complete, and of course any other information you are at liberty to disclose."

Although this specific request was for information not held at the time but to be created in the future, it was part of a series of correspondence and telephone calls exchanged between the complainant and the public authority up until October 2005. The investigation regarding his ex-wife's legal aid funding took place and was completed during this time. The ongoing correspondence culminated in the following text contained within an email from the complainant to the public authority on the 27th October 2005 which clarified what information the complainant required:

"Therefore I am only interested in the investigation, related statements, and of course the outcome."

The request was then understood between the parties to be for the outcome of the investigation of the complainant's ex-wife's claim for legal aid and whether the matter was referred to the police for possible prosecution of the complainant's ex-wife.

3. The public authority responded to the request in a letter of 9 November 2005 providing some limited information regarding the general issue but refusing to provide the outcome of the investigation. Although no specific exemption was cited in relation to this, the public authority stated that it is subject to restrictions under the Access to Justice Act 1999 (AJA) with regard to disclosure of such information. The public authority also stated that it would neither confirm nor deny whether the matter was transferred to the police. The exemption at section 40(2) of the Act was cited as disclosure would breach the Data Protection Act 1998 (DPA) but no further explanation was offered.
4. On 15 November 2005 the complainant responded to the public authority providing arguments in favour of disclosure and suggesting that the information be provided in redacted form to comply with the DPA. This letter was treated as a request for internal review by the public authority.
5. An internal review was conducted and the result communicated to the complainant by letter of 28 December 2005. The decision not to provide the outcome of the investigation and not to confirm or deny whether referral was made to the police was upheld. The letter explains that redaction of the personal details within the investigation report would not prevent disclosure of personal information as the complainant is aware that the report relates to his ex-wife. With regard to the decision not to confirm or deny whether the matter was referred to the police, the public authority decided that the section 40 exemption did not apply but that the exemption at section 31(1)(g) and (2)(a) did. No detail is given save for the text of the section of the Act being included and it is simply stated that there is no wider public interest in this case.

The Investigation

Scope of the case

6. On 30 December 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The complainant had been provided with some detail regarding the outcome of the investigation but not the actual report relating to it. The Commissioner considered only that information which has not been disclosed to the complainant within the scope of this investigation.
8. Disclosure under the Act amounts to disclosure to the general public, the Commissioner is therefore unable to give consideration to the special interests of the complainant when considering a public authority's decision to withhold information.

Chronology

9. The Commissioner wrote to the public authority on 7 June 2007. He pointed out that there were procedural issues with regard to the public authority's responses to the complainant.
10. He also asked for a copy of the investigation report that section 40(2) had been applied to and for more information regarding the application of the exemption and the reasoning behind the decision not to confirm or deny whether the matter was referred to the police.
11. The public authority responded to the Commissioner in a letter of 8 August 2007. This explained the reasoning behind the decision not to confirm or deny in relation to section 31 and the writer stated that in her opinion, section 40(2) did also apply. The letter reiterated the public authority's position that the investigation report is the complainant's ex-wife's personal data.

Analysis

Procedural matters

12. Section 17 of the Act sets out the requirements for a refusal notice. The full text of section 17 can be seen in the attached legal annex. A refusal notice must provide the exemption relied upon and explain why it applies if it is not obvious. Further, the public authority must provide details of its internal review procedure if it has one and the applicant's right to complain to the Information Commissioner under section 50.
13. The refusal notice of 9 November 2005 did not fully comply with section 17 (1)(a), (b) and (c) of the Act as it did not cite full details of the section 40 exemption or

explain why it applied in any detail and it did not cite the section 31 exemption. It also did not comply with section 17 (7)(a) and (b) as there are no details of the internal review process and the right to complain to the Commissioner was not included.

Exemption

14. The public authority cited the exemption at section 40(2) of the Act as the reason for not disclosing the investigation report. Section 40 of the Act is detailed within the legal annex. It states that information that constitutes third party personal data is exempt from disclosure if releasing that information would breach any of the data protection principles in Schedule 1 of the DPA.
15. The Commissioner is satisfied that the investigation report is the personal data of the complainant's ex-wife as she is the sole subject of the report. It contains information about her personal financial circumstances and details of the reasoning behind decisions made in relation to the investigation which directly affect her.
16. Under the first data protection principle, processing of personal data must be fair and lawful and shall not be processed unless one of the conditions set out in Schedule 2 of the DPA is satisfied.
17. When reaching a view about whether disclosure of the requested information would be fair, the Commissioner has considered a number of factors, namely:
 - the nature of the information requested and the level of prejudice to the rights and freedoms of the data subject (the complainant's ex-wife);
 - whether the legitimate interests of the public having access to this information outweigh the prejudice to the rights and freedoms of the data subject;
 - the reasonable expectations of the complainant's ex-wife in relation to disclosure;
 - whether or not the complainant's ex-wife has consented to the disclosure of the information.
18. Given that the information relates to legal aid and includes details of the ex-wife's financial circumstances, the Commissioner is satisfied that disclosing it would result in a significant invasion of her privacy and is likely to cause considerable distress.
19. In the case of the *House of Commons v the Information Commissioner and Norman Baker MP (EA2006/0015 and 0016; 16 January 2007)*, the Information Tribunal considered the exemption in section 40(2) and in particular the first data protection principle. In that case the Tribunal took the view that it is relevant when determining whether disclosure would be fair to consider whether the information relates to an individual's public or private life. It found that where information is

requested which relates to a public official and processing arises through the performance of a public function the interests of the data subject are no longer first or paramount. However, in this case the information relates to a private individual and their interaction with the public authority on a personal matter. Therefore the Commissioner is satisfied that the interests of the data subject should be the first and paramount consideration.

20. The Commissioner recognises that the public may have a legitimate interest in accessing information about the investigation which is the subject of this request. Disclosure of the information would allow them to scrutinise the way in which investigations are carried out and to understand the decisions taken by the public authority in this case. It would also ensure that the public authority is accountable for its decisions in respect of legal aid which is funded by the public purse. However, although these are significant arguments, in this case the Commissioner does not consider that they are sufficient to outweigh the complainant's ex-wife's right to privacy, particularly given the nature of the information and the fact that she is a private individual.
21. When considering the reasonable expectations of the complainant's ex-wife the Commissioner has been mindful of the nature of the information as this will often shape those expectations. He accepts that she would not expect that information about personal finances would be released.
22. In addition he has taken into account the purpose for which the information was obtained and created and what, if anything, the complainant was told about how the information would be used. Some of the information was initially collated in order to assess means for an application for legal aid and some was created as part of an investigation surrounding the grant of that legal aid. In these circumstances, the Commissioner is satisfied that the data subject would not hold a reasonable expectation that the information was obtained with a view to it being disclosed to the public at any point. In particular, he notes that some of the LSC application forms and other general information available on its website contain explanations of how information will be used and shared with other organisations. In the Commissioner's view these statements are likely to set a reasonable expectation that information will not be disclosed.
23. In addition he also notes that section 20 of the Access to Justice Act 1999 includes a specific restriction on the disclosure of information furnished to the public authority in connection with the case of an individual seeking or receiving funds. Again, he considers that this is likely to influence the ex-wife's expectations about how her information will be used and would set an expectation that it would not be disclosed.
24. The Commissioner is not aware that the complainant's ex-wife has been consulted about the disclosure. Neither has the public authority indicated whether there has been any explicit voluntary consent or objection to the disclosure of the information. In the specific circumstances of this case, the Commissioner considers that it was reasonable for the public authority not to have consulted the data subject and to have concluded that she would have objected to the disclosure of the requested information.

25. Taking into account all of the points above the Commissioner is of the opinion that disclosure of the information would be unfair under the terms of the first data protection principle.
26. The Commissioner gave consideration to the complainant's suggestion that the personal and identifying details within the investigation report be redacted in order to prevent disclosure of personal information. He is satisfied that this would not prevent disclosure of personal information as the report itself is the personal information of the data subject and as at least one member of the public (the complainant) is aware of who the data subject is. It is likely that other members of the public with knowledge of the data subject would also be able to identify her if this information were to be released. This is unless so much of the information is redacted so as to render the report unintelligible.
27. The Commissioner is therefore satisfied that the information should remain exempt from disclosure.

Duty to Confirm or Deny

28. The public authority initially cited the exemption at section 40 of the Act as the basis for not confirming or denying whether the matter was referred to the police for possible prosecution of the complainant's ex-wife. At the internal review stage it overturned this and introduced the section 31 exemption. However the Commissioner considers that section 40 is relevant to this information. Therefore he has considered whether or not the refusal to confirm or deny on the basis of that section of the Act was appropriate.
29. Section 40(5)(b)(i) provides that the duty to confirm or deny whether information is held in relation to a request received by the public authority does not arise where such confirmation or denial would in itself, contravene one of the data protection principles or section 10 of the DPA.
30. In this case, to confirm or deny whether the issue investigated by the public authority was referred to the police for consideration would provide personal details of the complainant. It would reveal whether she was subject to potential criminal prosecution.
31. The Commissioner is satisfied that to confirm or deny this information would be unfair under the terms of the first data protection principle for the same reasons as outlined in paragraphs 17-24 above. He is therefore of the opinion that the public authority was correct to neither confirm nor deny on the basis of section 40(5)(b)(i) of the Act. As the Commissioner has concluded that this section applies he has not given further consideration to the exemption at section 31.

The Decision

32. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

Section 40(2)
Section 40(5)

The information requested is the personal data of a third party and is therefore exempt from disclosure and the duty to confirm or deny respectively.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

Section 17(1)
Section 17(7)

The refusal notice did not comply with all of the requirements of section 17 of the Act.

Steps Required

33. The Commissioner requires no steps to be taken.

Other matters

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Act states that requests for information must be made in writing. Such requests must be for recorded information held by the public authority. As such a request for information that is expected to be held in the future is not a fully compliant request. In this case, with the clarification contained in the complainant's email of 27 October 2005, the public authority and the complainant both had the understanding that a request had been made and it was responded to under the terms of the Act. The Commissioner proceeded with an investigation on that basis but he would not usually do so without clear evidence of a request for information made in writing.

Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

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 1st day of November 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure 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
- (b) contain particulars of the right conferred by section 50.”

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

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

Section 40(3) provides that –

“The first condition is-

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

Section 40(4) provides that –

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

Section 40(5) provides that –

“The duty to confirm or deny-

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

Section 40(6) provides that –

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

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

SCHEDULE 1

The data protection principles

Part I

The principles

- 1 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.
- 2 Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
- 3 Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
- 4 Personal data shall be accurate and, where necessary, kept up to date.
- 5 Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
- 6 Personal data shall be processed in accordance with the rights of data subjects under this Act.
- 7 Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
- 8 Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.