

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 15 May 2007

Public Authority: City of York Council
Address: Guildhall
York
YO1 9QN

Summary

The complainant requested information from City of York Council (the Council) relating to the early retirement of the Director of Commercial Services. The Council withheld this information on the grounds that section 40(2) of the Act applied; in that the information requested constituted the Director's personal data and to release it would be unfair to him. The Commissioner is satisfied that the Council was correct to apply the exemption in this case; he does not therefore require the Council to take any further steps in respect of this request.

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 complainant wrote to the Council on 24 March 2006. He referred to the "Freedom of Information Act" in his correspondence and made a number of general comments about the early retirement of David Finnegan, Director of Commercial Services, from the Council.
3. The Council responded to the complainant on 18 April 2006. It stated that as the complainant had not defined precisely the information he required the Council had interpreted his letter as:

"...a request for information about the circumstances surrounding Mr Finnegan's retirement".

The Council stated that the information would be withheld for the following reasons:

- “it constitute[d] personal data and disclosure of such information would not be consistent with an individual’s right to privacy under the Data Protection Act 1998”; and
- “it would represent a breach of the duty of confidence owed to an individual and as such could expose the Council to legal action”.

The complainant was offered the opportunity to clarify his request if the Council had misunderstood the nature of the information he sought.

4. On 9 May 2006 the complainant wrote to the Council. He asked the Council to:

“reconsider supplying, under the Freedom of Information Act, details of why Mr Finnegan...was obliged to leave [the Council], and financial settlement”.

5. The Council wrote to the complainant on 15 May 2006 following completion of an internal review into its original refusal to supply the information requested. It confirmed that it considered the information requested had been properly refused in order to ensure Mr Finnegan’s privacy was protected. Further, the Council argued that the agreement it had reached with Mr Finnegan contained confidentiality clauses which, if breached, could result in legal action being taken against the Council.

The Investigation

Scope of the case

6. On 13 June 2006 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 Council’s refusal to supply the information he had requested.

The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

7. The Commissioner telephoned the Council on 11 January 2007 to advise that he would shortly be able to begin the investigation into this complaint. He explained that he would require the Council to provide a copy of the information it had withheld from the complainant. The Council stated that whilst it wished to co-operate with the Commissioner as much as possible, the information withheld from the complainant was protected by a confidentiality clause and as such the Council would not be inclined to provide it to the Commissioner unless a formal request was made for the information.

8. The Commissioner served an Information Notice on the Council, dated 29 January 2007. The Notice required the Council to “furnish the Commissioner with the information specified below, namely:
 1. information about the circumstances surrounding Mr Finnegan’s leaving the employment of the Council; and
 2. details of any financial settlement paid to Mr Finnegan”.
9. On 8 February 2007 the Council contacted the Commissioner. It stated that it believed the terms of the Information Notice could be met by providing two pieces of information to the Commissioner in the first instance, and that it could supply further information during the course of the investigation if this was necessary. The Commissioner agreed to this course of action.
10. The Council wrote to the Commissioner on 26 February 2007 and enclosed a sample of documents containing information withheld from the complainant.
11. Following a review of this information the Commissioner required some clarification of the information that had been provided. On 30 March 2007, the Council telephoned the Commissioner to provide this.

Analysis

Procedural matters

Section 17 - Refusal Notices

12. The complainant did not specifically ask the Commissioner to consider whether the Council complied with section 17 of the Act in respect of his request. However, the Council’s letter to the complainant of 18 April 2006, which constitutes a refusal notice for the purposes of the Act, has come to the Commissioner’s attention during the course of his investigation.
13. Section 17(1) of the Act states:

“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.”

14. The Council's refusal notice stated that the information requested was exempt from disclosure because:
- "it constitutes personal data and disclosure of such information would not be consistent with an individual's right to privacy under the Data Protection Act 1998"; and
 - "it would represent a breach of the duty of confidence owed to an individual and as such could expose the Council to legal action".
15. The Council clarified in an email to the Commissioner dated 26 April 2007 that it had intended to rely upon exemptions 40 and 41 in its refusal notice. The Council did not, however, state to the complainant that it was relying upon these exemptions under the Act and therefore it failed to meet the requirements of section 17(1)(b) in respect of this request.

Exemptions

Section 40(2) – Personal Information

16. Section 40 of the Act sets out the personal information exemption.

17. Section 40(2) of the Act states:

"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."

The first condition is satisfied where disclosure of the personal information would contravene either one or more of the data protection principles as set out in Schedule 1 of the Data Protection Act 1998 (the DPA), or section 10 of the DPA (the right to prevent processing likely to cause damage or distress).

The second condition is satisfied where the personal information would be exempt from disclosure to the data subject (the person to whom the information relates) under the DPA.

18. All of the information withheld from the complainant is about Mr Finnegan. It therefore constitutes Mr Finnegan's personal data. The Commissioner has gone on to consider whether disclosure of the information requested would breach one or more of the data protection principles.
19. The Commissioner considers the first data protection principle to be relevant in this case. It states:

“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”.

20. In considering whether disclosure of Mr Finnegan’s personal data would contravene the first data protection principle, the Commissioner has taken the following factors into account:

- the existence of a compromise agreement between the parties;
- Mr Finnegan’s reasonable expectations about what should happen to his personal data;
- Mr Finnegan’s position as a senior employee of the Council.

Compromise agreement

The Commissioner believes that compromise 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 a compromise agreement and has built safeguards into the process to ensure employees receive independent and accountable legal advice before entering into such agreements. Details of the reasons for Mr Finnegan’s departure and any payment(s) made to him are included in the compromise agreement.

The Commissioner also believes that the right to access official information and the right to reach an equitable compromise when an employer/employee relationship comes to an end are not mutually exclusive. However, where a compromise agreement has been reached between a Council and a senior employee of that Council, 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.

Reasonable expectations

From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within Mr Finnegan’s reasonable expectations. The compromise agreement includes a confidentiality clause, which is binding on both the parties.

Seniority

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 relates to an employee's professional life, and not their personal life.

21. The Commissioner is satisfied that the information requested was correctly withheld by the Council under section 40(2) of the Act. Therefore, he has not gone on to consider whether the Council correctly applied section 41 of the Act, which provides an exemption for information which was provided to public authorities in confidence.

The Decision

22. 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:

It was correct to withhold the information by applying the exemption under section 40(2) of the Act.

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

It did not inform the complainant upon which exemption it was relying when it issued the refusal notice and therefore it breached section 17(1)(b) of the Act.

Steps Required

23. The Commissioner requires no steps to be taken.

Right of Appeal

24. 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 15th day of May 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Refusal of a 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(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.”

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.

The first data protection principle provides –

“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.”