

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 September 2009

Public Authority: Backwell Parish Council
Address: 43 Rodney Road
Backwell
Bristol
BS48 3HW

Summary

The complainant made a request to Backwell Parish Council for copies of bank statements for the period December 2007 to March 2008. The Council refused the request claiming that all of the requested information was exempt under sections 40, 43 and 41 of the Act. During the Commissioner's investigation, the Council agreed to disclose most of the information that it had originally withheld, with the exception of some information that it maintained was exempt under section 40(2) of the Act. The Commissioner finds that sections 43 and 41 are not engaged, but he is satisfied that the remaining information is exempt under section 40(2). As bank statements were listed as a class of information in the Council's publication scheme at the time of the request the Council breached section 19(1)(b) of the Act for not making the information available on request. The Commissioner has also identified a number of procedural shortcomings in the way the Council handled the complainant's 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.

Background

2. Following a complaint made to the Employment Tribunal by the Council's former clerk, at a preliminary hearing of the Tribunal in November 2007, the Tribunal chairman ruled in the clerk's favour and ordered the Council to pay £1,000 in costs and both parties were urged to try to settle out of court. Subsequently, a

settlement agreement was reached through ACAS conciliation between the Council and the former clerk and an amount of compensation agreed and paid.

3. The settlement agreement which was reached between the Council and the former clerk was subject to an explicit confidentiality clause which required both parties to keep the terms of the agreement strictly confidential.

The Request

4. On 19 June 2008 the complainant made a request to the Council for:

“copies of all bank statements for all accounts held by the council for the months of:

December 2007
January 2008
February 2008
March 2008”.

5. The Council responded to the request on 8 July 2008 stating that the information requested was exempt under sections 40 and 43 of the Act. The Council also stated that information about any particular payment was exempt under section 41.
6. The complainant requested an internal review of the Council's decision on 17 July 2008 and referred the Council to its own publication scheme, published in accordance with section 19 of the Act, which listed bank statements as one of the classes of information it proactively published.
7. On 13 August 2008 the Council provided the complainant with the outcome of its internal review. The Council stated that the complainant's request had been discussed at the full Council meeting held on 7 August 2008. The Council upheld its decision not to release the information requested.

The Investigation

Scope of the case

8. On 23 July 2008 the complainant wrote to the Commissioner advising that the Council intended to change its publication scheme to exclude bank statements and other documents from its current scheme. The complainant asked the Commissioner to investigate the matter as he believed the Council were unduly preventing disclosure of information contained in its publication scheme. On 18 August 2008 the complainant provided the Commissioner with a copy of the Council's internal review.

9. Given that the complainant expressed dissatisfaction with the Council's refusal to provide the information requested, the Commissioner considers that the complainant's communications of 23 July 2008 and 8 August 2008 constitute an application for a decision under section 50 of the Act.
10. The Commissioner confirmed to the complainant on 31 March 2009 that the scope of his investigation was to determine whether the Council was correct in withholding the requested information it held at the time the request was made.
11. Some issues were resolved during the course of the Commissioner's investigation. The Council withdrew its reliance on section 43 in a letter to the Commissioner dated 22 April 2009 and on 25 June 2009 the Council accepted that some information it had originally withheld was not exempt and agreed to disclose some information relating to the request. Following this disclosure, the complainant confirmed to the Commissioner that he was content for information relating to the Council's bank account number, sort code and account numbers relating to individual payments made or received to be excluded from the scope of his request.
12. In light of the above the only outstanding withheld information is information contained in the Council's bank statement relating to the amount of the settlement payment it made to its former clerk. Therefore the Commissioner's decision in this case relates solely to this remaining withheld information.
13. The concerns which the complainant raised in relation to the Council's proposal to amend its publication scheme are covered in the Other Matters section of this Notice.

Chronology

14. On 21 August 2008, the Commissioner wrote to the Council to confirm that the complaint had been deemed eligible for consideration under the Act and to request a copy of the withheld information.
15. On 2 September 2008 the Council responded to the Commissioner providing some of the withheld information and a copy of a confidential settlement agreement reached following a complaint made by its former clerk to the Employment Tribunal. The Council stated that if the information requested were disclosed, it would reveal details of the confidential settlement figure which was paid to its former clerk. The Council's letter only made reference to the exemptions at sections 40 and 41 of the Act as the basis for refusing to disclose the information requested. The Council did not provide any information in relation to its reliance on section 43 to withhold the information.
16. On 31 March 2009, the Commissioner contacted the Council and asked for a full copy of the withheld information, confirmation as to the exact exemptions on which the Council was relying, and further information in respect of its application of the exemptions.

17. The Council responded to the Commissioner on 22 April 2009 confirming that it had three bank accounts. A savings account (account 1), a principal current account (account 2) and a third account which contained details of a payment made to solicitors in the settlement of the employment claim made by its former clerk (account 3). The Council accepted that the information contained in accounts 1 and 2 did not contain or constitute exempt information themselves. The Council therefore agreed to disclose the majority of information contained in accounts 1 and 2, with account numbers, bank sort code and limited personal details of recipients of payments redacted. However, the Council considered that the information contained in account 3 was exempt under sections 40(2) and 41 of the Act. The Council also confirmed that it had withdrawn its reliance on section 43.
18. The Commissioner wrote to the Council on 8 May 2009 requesting a copy of all the information which the Council was prepared to release, together with copies of all information it maintained was exempt. The Commissioner advised the Council that he considered it unlikely that the section 41 exemption was engaged, and requested further information about the Council's application of the section 40 exemption and why it considered that disclosure would be unfair.
19. The Council responded to the Commissioner on 18 May 2009 and provided copies of all the information requested by the complainant, highlighting the proposed redactions. The Council provided further information in respect of its application of the section 40 exemption and still maintained that section 41 was also engaged in respect of the information requested. The Council also provided the Commissioner with a copy of a newspaper article regarding the complaint made by its former clerk which resulted in a settlement payment being made to her.
20. The information which the Council proposed to release comprised of:
 - Accounts 1 and 2
All information released with the exception of the bank account number, sort code, branch identifier number and details of account numbers referring to amounts paid in and paid out.
 - Account 3
Information released with the exception of the bank account number, sort code, branch identifier number and details of account numbers referring to amounts paid in and paid out. In addition, as this was the account from which the settlement payment to its former clerk was made, the Council also proposed to redact the majority of the paid out columns, with the exception of transfer amounts to other accounts, the entire paid in and balance columns and the account summary section shown in each statement. The Council also proposed to redact the name of the Solicitors via whom the settlement payment was made.
21. The Commissioner contacted the Council on 25 June 2009 and asked it to release the information proposed, but to include the name of the solicitors to whom the settlement payment was made, as the Council had previously

confirmed that this information was publicly available in the Employment Tribunal public register. The Council agreed to this additional disclosure.

22. On 22 June 2009 the complainant contacted the Commissioner for an update on his case. The complainant advised the Commissioner that the reason he had made his information request to the Council was to determine the amount of compensation which was paid to its former clerk following her complaint to the Employment Tribunal.

Findings of fact

23. The Council confirmed to the Commissioner that, at the time of the request, bank statements were listed within a class of information in its publication scheme which it had adopted on 19 December 2002. Subsequent to the request, the Council sought to remove bank statements from its publication scheme, but this proposal was rejected by the Commissioner.
24. During a conversation with the Commissioner, the complainant advised that he believed that the Council's bank statements had been made available for public inspection. The Council has confirmed to the Commissioner that this inspection was in accordance with its obligations under The Audit Commission Act 1998 ('ACA 1998'). The ACA 1998 confers powers on the Audit Commission to inspect, audit and prepare annual reports on the accounts of local government, housing, community safety and fire and rescue services. The ACA 1998 and its accompanying Regulations also provide a right of access to a limited group of people to inspect the accounts and supporting documentation for a limited period of 20 working days. In this case, the 20 working day inspection period was from 21 July 2008 to 15 August 2008.
25. Under section 14 of the ACA 1998, a local government elector may inspect any statement of account prepared by their local authority. However, section 15 of the ACA 1998 also gives a right to an 'interested person' to inspect the accounts.

Analysis

Substantive Procedural Matters

Section 19

26. Section 19 of the Act sets out the duty of every public authority to adopt and maintain a publication scheme, which provides details of information made available proactively by that authority. Subsection 1(b) sets out a requirement for authorities to publish information in accordance with their adopted scheme.
27. In this case the information requested, namely the Council's bank statements, was listed within the Council's publication scheme at the time of the request. The Council had therefore made a commitment to putting this information into the public domain. The Commissioner's view is that it is possible for there to be

exempt information contained within a class of information listed in an authority's publication scheme. However, by initially refusing to disclose the information in response to a request, even in redacted form, the Council failed to fulfil its commitment to publish this information, and accordingly the Commissioner considers this a breach of section 19(1)(b) of the Act.

Exemptions

Section 40(2) – personal information

28. Section 40(2) of the Act provides an absolute exemption for information that constitutes the personal data of third parties. Such information is exempt if its disclosure would breach any of the data protection principles, as set out in Schedule 1 to the Data Protection Act 1998 ('the DPA'), in accordance with section 40(3)(b). All sections of the Act are reproduced in the attached legal annex.

The Council's position

29. The withheld information in this case is information contained in the Council's bank statements relating to the amount of the settlement payment it made to its former clerk. The Council believes that the complainant made the information request in order to put into the public domain details of the settlement amount which was paid to its former clerk. The Council provided the Commissioner with a copy of the settlement agreement dated 17 January 2008 in order to demonstrate that the agreement provided a specific clause of confidentiality on the part of both parties.
30. The Council's view is that if the withheld information were released it would lead to the identification of the payment as being the settlement amount paid to its former clerk. The reason for this is that, although the payment was made to solicitors acting on behalf the former clerk, the name of the solicitors acting on her behalf is information which is publicly available from the Employment Tribunal. Further, the Council's view is that the bank statement needed to be redacted in the way proposed as it would be easily possible for a person to calculate the amount of the settlement payment if any further information were disclosed. The Council stated that this would be in breach of the confidentiality clause in the settlement agreement, which would be actionable by its former clerk.
31. The Council considered that disclosure of the information requested would constitute a breach of the second data protection principle because the information relates to a confidential settlement agreement. The Council also argued to the Commissioner that disclosure would contravene the sixth data protection principle because disclosure would be in breach of the rights of the data subject.
32. The Council stated that its former clerk, the recipient of the settlement payment, had not consented to disclosure and had not taken steps herself to make the amount of the settlement payment known. The Council considered the amount of

the settlement payment to constitute private financial information about its recipient. Further the Council argued that disclosure of information which would lead to the identification of the settlement payment would be unfair as the recipient of a payment was well known in the local community and disclosure could create local controversy, likely to have an adverse effect on her.

33. The Council acknowledged the legitimate public interest in access to official information, and in particular where that interest related to expenditure of public money. However, the Council stated that the purpose of settlement agreements, such as that entered into with its former clerk, is to reach a settlement as directed by the Employment Tribunal. The Council considers that there is a significant public interest in promoting such settlements, and securing the most appropriate use of Tribunal resources. Where such settlement negotiations and agreements are subject to confidentiality clauses, successful negotiations are likely to be inhibited if the outcome was to be disclosed into the public domain at a later date.
34. The Council has confirmed to the Commissioner that its annual return and associated documents for the period ending 31 March 2008 were made available for public inspection for the period 21 July 2008 to 15 August 2008 in line with the requirements of section 15 of the ACA 1998. The Council have also confirmed that this public inspection did not include its bank statements and that no member of the public made a request to examine the documents made available during the time of this public inspection.
35. The Council's view is that, taking all the circumstances of this case into account, the balance lies in favour of maintaining its application of section 40(2) in relation to the withheld information.

The complainant's position

36. The complainant is of the opinion that the information requested should be disclosed in full, particularly as bank statements were listed on the Council's publication scheme at the time of his request as a class of information routinely published.
37. In a discussion on 23 June 2009, the complainant advised the Commissioner that he had requested copies of all bank statements for the period December 2007 to March 2008 because the information he was actually looking for was the amount of the settlement payment the Council had made to its former clerk.
38. The complainant telephoned the Commissioner on 29 June 2009 to confirm receipt of a set of redacted bank statements from the Council. During this discussion, the complainant advised the Commissioner that he believed that a full set of the Council's bank statements was made available by the Council for public inspection in August 2008. In view of this, the complainant believed that the principle of access to the information had been established, and therefore the withheld information should be disclosed.

The Commissioner's position

39. In his consideration of both the Council's and the complainant's representations, the Commissioner has considered the following issues:
- Whether the information requested constitutes personal data as defined in section 1(1) of the DPA;
 - Whether living individuals can be identified from the data; and
 - Whether disclosure would breach any of the data protection principles.

Is the information 'personal data'?

40. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by the section 1(1) of the DPA:

"... 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"

41. The withheld information in this case consists of the amount the Council paid to its solicitors to cover the settlement payment. The information on the bank statement does not refer to the former clerk, but the Commissioner is satisfied that, in the hands of the Council, this information constitutes personal data. The reason for this is that the information relates to the settlement payment made to solicitors acting on behalf of the former clerk, and this in itself is directly linked to the dispute between the former clerk and the Council.
42. The Commissioner has therefore gone on to consider whether disclosure of the actual information to the public would lead to the identification of the individuals to whom the personal data relate. This is because if disclosure of the information requested could not lead to the identification of the data subjects, then it would be unlikely that such a disclosure could be considered 'unfair'.

Can living individuals be identified from the data?

43. The Commissioner has drawn a parallel with the concept of an 'identifiable person' as set out in the European Data Protection Directive (95/46/EC), which is implemented in the UK by the DPA:

““personal data” shall mean any information relating to an identified or identifiable natural person ...; an identifiable person is one who can be identified, directly or indirectly ...”

44. The Commissioner's technical guidance on 'Determining What is Personal Data'¹ states:

“Sometimes it is not immediately obvious whether an individual can be identified or not, for example, when someone holds information where the names and other identifiers have been removed. In these cases, Recital 26 of the Directive states that, whether or not the individual is nevertheless identifiable will depend on “all the means likely reasonably to be used either by the controller or by any other person to identify the said person”.

Therefore, the fact that there is a very slight hypothetical possibility that someone might be able to reconstruct the data in such a way that the data subject is identified is not sufficient to make the individual identifiable for the purposes of the Directive. The person processing the data must consider all the factors at stake.

The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies”.

45. On the one hand, the Council bank statements simply detail a payment which has been made to solicitors: this does not obviously identify a particular individual. However, in order to determine whether the withheld information in this case can identify individuals the Commissioner has looked at various factors, including other information already in the public domain (whether published by the Council or others, or information known in the community).
46. The Council provided the Commissioner with a copy of a newspaper article which was published in a number of local newspapers. This article provides the name of the former clerk to the Council and details of the events which led to the Council being ordered to pay £1,000 in costs and both parties being urged by the

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

Employment Tribunal chairman to try to settle the matter out of court. The article also confirms that the Council paid an amount of compensation to its former clerk, and that details of the amount of the payment were not given.

47. The Council has also confirmed that the name of the solicitors acting on behalf of its former clerk in respect of the complaint made against the Council is information which is recorded in the Employment Tribunal's register, which is in the public domain.
48. Despite the fact that the payment was made to solicitors acting on behalf of the former clerk, and not the clerk herself, taking into account the above factors the Commissioner believes that it would be possible for the recipient of the payment to be identified if the withheld information were disclosed and that this is more than a slight hypothetical possibility. Accordingly, the Commissioner is satisfied that the information requested does constitute personal data, within the definition at section 1(1) of the DPA.

Would disclosure breach any of the data protection principles?

49. The second test under section 40(2) is whether the disclosure of the information would breach any of the data protection principles, as set out in 40(3)(b). The Council has claimed that disclosure of the information requested would breach the first data protection principle which 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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

50. In this context, 'processing' is construed broadly and includes disclosure of the information requested.

First data protection principle

51. The first data protection principle has two components:
1. Personal data shall be processed fairly and lawfully and
 2. Personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met.
52. There are six conditions in Schedule 2 of the DPA, but only condition 1 (consent) or condition 6 (legitimate interests) would usually be relevant to disclosures under the Act. The Commissioner notes the statement made by the Council that the recipient of the payment has not consented to the release of the information.

53. Therefore, the only other basis on which the information requested could be lawfully disclosed would be if condition 6 of Schedule 2 of the DPA was met. This condition states that:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by 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”.

54. The Commissioner's awareness guidance on section 40² states that following the Information Tribunal decision in *Corporate Officer of the House of Commons v Information Commissioner and Leapman, Brooke and Thomas (EA/2007/0060 etc.; 26 February 2008)* public authorities should approach condition 6 as a three-part test:

1. there must be a legitimate public interest in disclosure;
2. the disclosure must be necessary to meet that public interest; and
3. the disclosure must not cause unwarranted harm to the interest of the individual.

Legitimate interests of the public in disclosing the information

55. The Commissioner acknowledges that there is a legitimate public interest in disclosure of information which would promote accountability and transparency in the spending of public money and in this instance the Commissioner accepts that disclosure of the withheld information would meet that public interest. However, the Commissioner also acknowledges that the Council has published its annual accounts for the period ending March 2008 which provides a breakdown of how the Council spent its budget for the period in question, which the Commissioner considers would go some way to informing the public how the Council spent its budget.
56. The Commissioner recognises the important role that settlement agreements such as the one entered into between the Council and its former clerk can play. Such agreements can avoid the time, expense and stress of litigation in an Employment Tribunal and by entering such agreements public authorities can save significant amounts of money by avoiding the need for costly and lengthy litigation.
57. The Commissioner accepts that the precise amount of the settlement payment is information which is not, and has not been made, publicly available and therefore a disclosure under the Act would be necessary for the above public interest to be satisfied. The Commissioner has therefore gone on to consider whether disclosure would cause any unwarranted harm to the interest of the individual concerned.

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Expectations of the data subject

58. The Commissioner has considered the expectations of the former clerk of the Council in respect of the settlement agreement and the withheld information. The Commissioner has found no evidence to suggest that the former clerk of the Council has proactively sought to put details of her departure, and in particular the amount of her settlement payment, into the public domain. If she had sought to gain publicity about the termination of her employment it may have been possible to argue that she would not have a reasonable expectation that the information relating to her settlement payment would remain private, however, this is not the case in this instance. The Commissioner also accepts the Council's argument that its former clerk has resisted attempts to bring information about her settlement payment into the public domain.

59. In his guidance on the section 40 exemption, the Commissioner makes it clear that the seniority of an official should be taken into account when their personal data is requested under the Act:

"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".

60. In this case, the individual was the clerk of a small parish council and it is the Commissioner's view that, as such, she would have had no expectation that information relating to the settlement agreement would be put into the public domain. Further, the Commissioner has taken into account the fact that the settlement agreement between the Council and its former clerk contained an explicit confidentiality clause which required both parties to keep the terms of the agreement strictly confidential. The Commissioner accepts the Council's view that neither party had envisaged that any of the details of the agreement would be made public, particularly the amount of compensation which was agreed upon. The Commissioner also accepts that disclosure of the information requested in this case would be in breach of this agreement as it would enable identification of the settlement payment made to the former clerk.

61. In reaching his conclusion, the Commissioner is also mindful of the Information Tribunal decision in *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038)*, where 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".

62. The Commissioner has also considered the impact of the right of access to inspect information under the ACA 1998 on the expectations of the data subject in this case, the former clerk of the Council. As stated in paragraphs 24 and 25 above, the ACA 1998 provides a right of access to inspect accounting information for their local authority to any local government elector and 'any

persons interested'. Although the term 'interested person' is not defined within the ACA 1998, the Audit Commission suggest the term must refer to an individual who has a legal or financial interest in the accounts which would include local government electors, non-domestic rate payers and those with a financial or contractual relationship with the Council or those in receipt of services from the Council.

63. As the access rights to inspect the annual accounts are limited to "any local government elector" and "any persons interested", the Commissioner does not consider that this can simply refer to anyone who is interested (in the everyday sense of the word) in seeing the accounts of a public authority. Rather, the right of access is limited to a certain class of eligible individuals. The Commissioner is therefore not minded to accept that this right of access for a limited period of time, to a limited group of individuals is the same as the information actually being available to the public at large, which is, in effect, what a disclosure under the Act constitutes.
64. In theory, the ACA 1998 provides a large number of people with the right to a considerable amount of information which may have been provided in confidence or which may be commercially sensitive. In practice, however, the right of access seems to be little used by members of the public. The Commissioner is not persuaded that the mere existence of the access rights afforded to individuals by the ACA 1998 impacts upon any expectation of confidentiality. In the limited cases where the access right is exercised by an individual, the Commissioner would take this into account as one of the factors in both deciding whether an exemption is engaged and also in respect of whether an additional subsequent disclosure under the Act would cause any further prejudice or harm.
65. In this particular case, the Council has confirmed that the information requested i.e. copies of its bank statements were not made available for public inspection and also that no individual requested to examine its annual accounts and related documentation. It is therefore the Commissioner's view that the right of access afforded by the ACA 1998 has no bearing on expectations of the data subject in respect of the amount of the settlement payment and the confidentiality attached to the settlement agreement.

Harm caused by disclosure

66. As indicated above, the Commissioner notes that the recipient of the settlement payment has taken no steps to make the amount of her settlement payment publicly known and that she does not want information about her financial affairs known in the local community. The Commissioner also acknowledges the Council's argument that disclosure of information which could lead to the identification of the amount of the settlement payment could have an adverse impact on the recipient of the payment, and that this is more than a slight hypothetical possibility.
67. In light of the arguments above, the Commissioner's view is that disclosure of information which would lead to the identification of the settlement payment

made to the former clerk would represent a significant invasion of her privacy and would be unfair.

68. The Commissioner concludes that the rights and interests of the former clerk of the Council outweigh the legitimate public interest in disclosure. In reaching his conclusion, the Commissioner has given particular weight to the fact that under the Employment Rights Act 1996, an employee has the right to reach a compromise agreement with his/her former employer and that the terms of the agreement remain private.
69. In conclusion, the Commissioner considers that disclosure of the withheld information would be unwarranted by reason of prejudice to the legitimate interests of the data subject. As such, condition 6 of schedule 2 of the DPA has not been met. The Commissioner concludes that the Council has correctly applied section 40(2) to the remaining withheld information as disclosure would breach the first data protection principle. The Commissioner is therefore not required to consider whether disclosure would breach any of the other data protection principles.

Section 41

70. As the Commissioner's decision is that the withheld information is exempt under section 40(2), he is not required to make a decision in relation to the Council's reliance on the exemption under section 41.

Procedural Requirements

71. The complainant submitted his request on 19 June 2008 and the Council issued a refusal notice on 8 July 2008 claiming that all the information requested was exempt from disclosure by virtue of sections 40, 43 and 41 of the Act. As a result of the Commissioner's intervention, the Council disclosed some information relating to the request on 25 June 2009.
72. The Commissioner finds that the Council breached section 1(1)(a) of the Act in failing to indicate explicitly that it held information relevant to the request either in its refusal notice or in its internal review, and 1(1)(b) of the Act in that it failed to disclose information that the Commissioner concluded was not exempt. The Council also breached section 10(1) in relation to this information, as it was not provided within the statutory time period.
73. The Commissioner also finds that the Council breached sections 17(1)(b) and 17(1)(c) of the Act in that the refusal notice issued on 8 July 2008 did not specify the relevant subsections of section 40 and 43 on which the Council was relying.
74. Section 43 is a qualified exemption and therefore subject to a public interest test as set out in section 2 of the Act. The Council breached section 17(3)(b) as it did not explain in its refusal notice why it had concluded that the public interest in maintaining the section 43 exemption outweighed the public interest in disclosing the information.

75. The Council also breached sections 17(7)(a) and 17(7)(b) of the Act by failing to provide the complainant with adequate details of the right to request a review of the Council's decision and the right to appeal to the Commissioner.

The Decision

76. The Commissioner's decision is that the Council was correct to rely on section 40(2) of the Act as the basis for withholding the remaining information relating to the request, as it could lead to the identification of the settlement payment it made to its former employee.
77. However, the Commissioner has also decided that the Council did not deal with the request for information in accordance with Part 1 of the Act in the following respects:
- Section 19(1)(b) for failing to make information contained in its publication scheme available on request.
 - Section 1(1) a) in failing to confirm that it held information relevant to the request.
 - Section 1(1)(b) for its failure to disclose information that was not exempt until after the Commissioner's intervention.
 - Section 10(1) for failing to disclose information that was not exempt within the statutory time limit.
 - Section 17(1)(b) for failing to specifying the subsections of section 40 and 43 on which it was relying in its refusal notice.
 - Section 17(1)(c) for failing to adequately explain in its refusal notice why sections 40, 43 and 41 applied.
 - Section 17(3)(b) in failing to communicate its assessment of the public interest test in respect of section 43 in its refusal notice.
 - Section 17(7)(a) for failing to provide adequate details in its refusal notice about the complainant's right to request a review of its decision.
 - Section 17(7)(b) for failing to provide adequate details in its refusal notice about the complainant's right of appeal to the Commissioner.

Steps Required

78. The Commissioner requires no steps to be taken.

Other matters

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

Publication Schemes

80. At the time the request was received, the Council had adopted the Commissioner's model publication scheme for Parish, Town and Community Councils. The scheme states that the Council should make available bank statements from all accounts (limited to the last financial year).
81. After having received the complainant's request the Council approached the Commissioner (on 13 August 2008) and sought permission to exclude bank statements from its publication scheme. The Commissioner advised the Council that, as bank statements were a core class of information within the model publication scheme, this was not possible and that it was obliged to publish this information.
82. In addition to failing to publish in accordance with its publication scheme the Commissioner considers that, in attempting to exclude this information from its scheme, the Council did not act within the spirit of the Act. The Commissioner expects that, should the Council receive further requests for information contained within its publication scheme, this should be provided promptly in the manner specified in the scheme.

Internal Review

83. Paragraph 39 of the Code of Practice issued under section 45 of the Act (the 'Code') recommends that complaints procedures should:

"...provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."
84. Paragraph 40 of the Code states that in carrying out reviews:

"The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."
85. The Commissioner considers that the Council's internal review response did not provide evidence that its handling of the request had been reviewed or that its decision had been reconsidered. The Commissioner expects that, in future, the Council's internal reviews will conform to the recommendations of the Code.

Right of Appeal

86. 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.
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 served.

Dated the 2nd day of September 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that –

“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”.

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

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(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(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.”

Publication Schemes

Section 19(1) provides that –

“It shall be the duty of every public authority –

- (a) to adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a “publication scheme”),
- (b) to publish information in accordance with its publication scheme, and
- (c) from time to time to review its publication scheme.”

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).”

Data Protection Act 1998

Schedule 1

The first principle 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”.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data:

“1. The data subject has given his consent to the processing. 2. The processing is necessary-

- (a) for the performance of a contract to which the data subject is a party, or
- (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary-

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under any enactment,
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by 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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.”