

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 3 February 2010**

**Public Authority:** Lincolnshire County Council  
**Address:** County Offices  
Newland  
Lincoln  
LN1 1YL

### Summary

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The complainant requested copies of all correspondence relating to two incidents he believed occurred at a named school involving knives and information relating to any further incidents that may have taken place. The Council responded informing the complainant that it was not obliged to confirm or deny if the information is held by virtue of section 40(5)(b)(i) of the Act. As he remained dissatisfied, the complainant approached the Commissioner. The Commissioner has investigated the case and is satisfied that the Council correctly applied section 40(5)(b)(i) of the Act.

### The Commissioner's Role

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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

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2. The complainant contacted the Council on 27 June 2008 to request the following information be released under the Act:

"In [date redacted] two pupils at [named school] were apprehended carrying knives in the school.

I require:

All correspondence relating to these two particular incidents and any further incidents to date

#### Between

1. LCC Education Department (any member of staff) and [named school] or [name redacted] the Head Teacher or any (school abbreviation redacted) Governors
  2. Cfbt and [named school] or [name redacted] the Head Teacher or any of [redacted] Governors
  3. Governor help (run by LCC or cfbt) and [named school] or [name redacted] the Head Teacher or any of [redacted] Governors
  4. Any legal representative at LCC and any other member of LCC
  5. Any legal representative at LCC and [named school] or [name redacted] the Head Teacher or any [redacted] Governors.”
3. The Council responded on 21 July 2008 explaining that it was under no obligation to confirm or deny whether it holds the information requested by virtue of section 40(5)(b)(i) of the Act.
  4. The complainant appealed against this decision on 21 July 2008.
  5. The Council carried out an internal review and communicated its findings to the complainant on 13 August 2008. The internal review upheld the application of section 40(5)(b)(i) to neither confirm or deny if the requested information is held.

## The Investigation

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### Scope of the case

6. On 17 August 2008 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 whether the Council were correct to rely on section 40(5)(b)(i) of the Act.

### Chronology

7. The Commissioner wrote to the Council on 17 August 2009 to request some additional information concerning its application of section 40(5)(b)(i) of the Act.
8. The Council responded on 7 September 2009 and provided the additional information that was requested.
9. The Commissioner wrote to the complainant on 29 September 2009 to outline his preliminary assessment and to ask the complainant to consider withdrawing his complaint.
10. The complainant contacted the Commissioner on 7 October 2009. He stated that he was unwilling to withdraw his complaint, remained of the view that the Council had incorrectly relied on section 40(5)(b)(i) of the Act and had some further evidence to support his case.

11. The Commissioner wrote to the complainant on 14 October 2009 to request that a copy of the further evidence was supplied to assist his investigation. The complainant confirmed that he had made a fresh information request to the school for a copy of the evidence he was referring to. Despite reminders on 26 October, 3 and 14 December 2009 this evidence has not been forthcoming.

## Analysis

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### **Section 40(5)(b)(i) – personal data and the exclusion from the duty to confirm or deny**

12. The information was requested by the complainant in the belief (and it is irrelevant whether this is right or wrong) that an incident of the nature described in paragraph 2 above at a named school had occurred. This therefore prompted the Commissioner to initially consider whether the Council would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) (confirming or denying) by virtue of the provisions of section 40(5)(b)(i).
13. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request.
14. Generally, the provisions of section 40 subsections 1 to 4 exempt 'personal data' from disclosure under the Act. In relation to a request which constitutes the personal data of an individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the Data Protection Act ('the DPA') or would do so if the exemptions in section 33(A) of the DPA were disregarded.
15. A full text of section 40 of the Act is available in the Legal Annex at the end of this Notice.
16. Section 40(5)(b)(i) states:  
  
"The duty to confirm or deny –  
  
(b) does not arise in relation to other information if or to the extent that either –  
  
(i) the giving to a member of the public of the confirmation or denial would have to be given to comply with 1(1)(a) would (apart from the Act) contravene any of the data protection principles..."
17. In order for section 40(5)(b)(i) of the Act to be correctly applied the Council must establish the following two elements:

- 1) to confirm whether or not the information is held would reveal the personal data of a data subject as defined by section 1(1) of the DPA
- 2) that to confirm whether or not the information is held would contravene one of the data protection principles.

Would confirming or denying whether the information is held reveal the personal data of the data subject?

18. Personal data is defined by section 1(1) of the DPA. It states that –

“personal data means data which relate to a living individual who can be identified -

(a) from those data,

(b) from those data and other information which is in the possession of the, or 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”

19. The Council argued that due to the nature of the information being requested and the information which could reasonably be assumed to be held by the general public relating to such incidents if they have taken place, it is unable to confirm or deny whether it holds the requested information, as to do so would potentially release personal data relating to a data subject as defined in section 1(1) of the DPA.

20. The Council confirmed that if the requested information was held (as stated above it is not confirming either way) and it did comply with section 1(1)(a) of the Act this would be releasing to the world at large that an actual incident involving knives at a particular time took place at the named school. Although in such a scenario this confirmation would not release the name(s) of the pupil(s) concerned, the Council felt that it would still be possible for members of the public to establish from this confirmation the identity of the pupil or pupils concerned.

21. The Council explained that incidents of this nature are kept confidential. If an incident like the one described in this request occurred at any school under its constituency only those present at the actual incident would know the entire details and these details would only be released to staff on a need to know basis. However, staff, pupils at a school and parents from talking to their children and one another would generally know if a fellow pupil had been excluded by the fact of their absence and from this would know the date or approximate date of exclusion. If an incident like the one described in this request occurred, confirming that the Council holds the requested information would be releasing to the general public that the reason for the exclusion was the apprehension of knives. This would in effect confirm the identity of the pupil(s) involved in the said incident, the nature of the incident and their punishment. The Council argued that such information would be the personal data of that pupil(s).

22. It is the Commissioner's view that a consistent approach should be taken with information requests of this nature as to whether the public authority holds the requested information or not. Such an approach is necessary to protect those individuals where an incident has occurred and information is held. If 12(5)(b)(i) of the Act was only applied in those cases where information is held, it would be possible to establish from this approach where incidents of this nature had occurred.
23. The Commissioner accepts that to confirm or deny whether recorded information is held would be disclosing personal data relating to a data subject. As stated above, the Council is not confirming or denying whether the requested information is held. However, he accepts that if an incident had taken place of the nature described and the Council confirmed this fact then from that information together with information that would already be in the public domain it would be possible to identify the pupil(s) concerned.
24. The Commissioner also notes that it is a criminal offence to carry a knife on school premises. Information relating to the commission or alleged commission of such an offence would be the sensitive personal data of the pupil(s) concerned (a more detailed explanation of what constitutes sensitive personal data can be found in the Legal Annex section towards the end of this Notice).

Would confirming or denying whether the information is held contravene any of the data protection principles?

25. Turning now to the second test, the Council stated that to confirm or deny whether the requested information is held would breach the first data protection principle. The first data protection principle states in part that;  
  
"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."
26. The Council explained in generic terms that if such an incident occurred within a school in its area the pupil(s) involved would not reasonably expect this information to be released to the world at large in response to a freedom of information request. Such disclosure would be unfair and unlawful.
27. The Council accepted that there is a legitimate public interest in this type of information and matters concerning safety and discipline in schools. However, it explained that appropriate mechanisms are already in place for dealing effectively with incidents of this nature if and when they occur. The Council stated that when such incidents do occur steps are taken to address these issues in line with the procedures that are already in place and any benefit served by public debate does not warrant the resulting prejudice to the rights and freedoms of any pupils that are disciplined for such incidents.
28. The Commissioner accepts that if an incident of the nature described in the complainant's information request were to have occurred this very fact would be

- the pupil(s) concerned sensitive personal data. The pupil(s) concerned would have a reasonable expectation that this information would remain confidential and would only be disclosed to a very limited number of others in their professional capacity. This information would also concern the private life of that pupil or pupils. In other Decision Notices he has issued, the Commissioner has made a clear distinction between information which relates to one's private life and information that relates to one's professional capacity. The Commissioner's policy has been that he considers it more likely that disclosure of personal data would be unfair where it relates to an individual's private matters than if it relates to an individual acting in an official and professional capacity, particularly if disclosure would release sensitive personal data relating to that data individual.
29. Disclosing whether or not information is held would be confirming whether or not an incident involving knives at the named school at the date specified occurred. If an incident had occurred (and the Commissioner is not confirming one way or another) it would be possible for a member of the general public to piece information together and identify the pupil(s) concerned. In such a situation, members of the general public would be able to identify that a specific pupil was involved in a knife incident, which as stated above is a criminal offence. This type of information is sensitive personal data and would relate to the pupil's private life. Following the Commissioner's policy as outlined in the above paragraph, disclosure of this information would be unfair.
30. In this situation, disclosure would have an unlimited and timeless impact on the pupil(s) concerned and would inevitably affect their life/lives going forward in an uncontrolled manner. Where incidents of this nature do occur, the Council has explained that there are appropriate mechanisms already in place for the discipline of those pupils concerned.
31. The Commissioner has concluded that section 40(5)(b)(i) of the Act applies in this case. He accepts that to confirm or deny whether information is held would breach the first data protection principle and that there is no overriding reason(s) which would justify ordering the Council to comply with the duty imposed by section 1(1)(a) of the Act.

## The Decision

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32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that the exemption from the duty to confirm or deny provided by section 40(5)(b)(i) is engaged.

## Steps Required

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33. The Commissioner requires no steps to be taken.

## Right of Appeal

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34. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 3rd day of February 2010**

**Signed .....**

**David Smith  
Deputy Commissioner and Director of Data Protection**

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

## Legal Annex

### Freedom of Information Act 2000

#### 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.”

#### 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).”

## **Data Protection Act 1998**

### Section 2

“In this Act “sensitive personal data” means personal data consisting of information as to-

- (a) the racial or ethnic origin of that data subject,
- (b) his political opinions.
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.