

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 25 August 2010**

**Public Authority:** Basildon District Council  
**Address:** The Basildon Centre  
St Martin's Square  
Basildon  
Essex  
SS14 1DL

### **Summary**

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The complainant requested the Council to release copies of all recorded information it held in relation to a complaint she raised against a parish councillor. The Council responded refusing to disclose the information under sections 41 and 42 of the Act. During the Commissioner's investigation the Council claimed a late reliance on section 40(2) of the Act, as it identified that the requested information contains personal data. The Commissioner has considered the application of section 40(2) of the Act in this case and is satisfied that the requested information should be withheld under this exemption. As he is satisfied that section 40(2) of the Act applies to the requested information, he did not go on to consider the Council's former reliance on sections 41 and 42 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 19 August 2009 to request that the following information is released under the Act:

"...please may I have copies of all documents, letters, reports, memo's, telephone messages, legal advice and all information in relation to the above mentioned complaint to today's date."

The above information was requested in relation to a complaint investigation into the conduct of a parish councillor undertaken by the Council under the Standards Framework.

3. The Council responded on 17 September 2009. It advised the complainant that she had already received all the information she was permitted to receive under the Council's procedures. The Council explained to the complainant that it was unwilling to disclose the following information:

- a) the draft report commissioned by the Council's Monitoring Officer detailing the investigation undertaken into the parish councillor;
- b) the legal advice it received during this investigation.

Concerning the draft report, the Council confirmed that this was exempt from disclosure under Schedule 12A of the Local Government Act 1972. In respect of the legal advice it received during the complaint investigation, it advised that it felt this information was exempt from disclosure under section 41 of the Act.

4. The complainant requested an internal review on 29 September 2009.
5. The Council wrote to the complainant on 2 October 2009. It stated that it had undertaken an internal review and remained of the opinion that the outstanding information was exempt from disclosure for the reasons it had previously stated.

## The Investigation

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### Scope of the case

6. On 23 October 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider

whether the Council had acted appropriately by withholding the outstanding information under the Act.

7. During the Commissioner's investigation it was established that the withheld information is made up of the following:
  - a) a report dated 29 January 2009 commissioned by the Council detailing the investigation undertaken into the allegations made against the parish councillor;
  - b) a memorandum from the Monitoring Officer to the Assessment Sub-Committee dated 3 March 2009;
  - c) a series of emails relating to the complaint investigation, which the Council claimed details the legal advice it requested and received in relation to the investigation.
8. The Commissioner notes that the requested information was also withheld by the Council under the Local Government Act 1972 and Local Government Act 2000 (as amended by The Standards Committee Regulations 2008) and that the complainant has questioned the Council's ability to do so under this legislation. The Commissioner wishes to highlight at this point that he cannot comment on whether it was appropriate to withhold the requested information under this legislation as it is not within his remit. He can only consider whether the requested information should be disclosed under the Act. This will therefore be the focus of the remainder of this Notice.
9. During the investigation it was identified that some of the withheld information contains the complainant's own personal data. Access to an applicant's personal data should be considered under section 7 of the Data Protection Act 1998 ('the DPA'). It is therefore exempt from public disclosure by virtue of section 40(1) of the Act. The requested information which constitutes the complainant's own personal data will be considered separately by the Commissioner; it will therefore not form part of this Decision Notice. This Notice will focus on the remaining information only and whether this information should be disclosed under the Act.

## **Chronology**

10. The Commissioner wrote to the Council on 1 February 2010 to request copies of the withheld information. Concerning the report (item a of paragraph 7 above), the Commissioner requested the Council to consider the complainant's request for this information under the provisions of the Act. In respect of the legal advice referred to in the Council's Refusal Notice (item c of paragraph 7 above), the

Commissioner asked the Council to clarify which of the exemptions under the Act it wished to rely on.

11. The Council responded on 3 March 2010. It provided a copy of the report as requested (item a) and attached a further document; a memorandum from the Monitoring Officer to the Assessment Sub-Committee dated 3 March 2009 (item b of paragraph 7 above). It confirmed that it wished to rely on section 41 of the Act for the non disclosure of this information. The Council did not provide a copy of the legal advice it had also withheld but confirmed that it wished to rely on section 42 of the Act.
12. The Commissioner contacted the Council on 10 March 2010 to request, again, a copy of the legal advice. He also requested the Council to clarify in respect of item b whether the complainant had received a copy of this previously or whether it formed part of item a. In respect of the report itself (item a), the Commissioner asked the Council whether it had considered section 40(2) of the Act.
13. The Council responded on 17 March 2010 providing a copy of the legal advice previously withheld from the complainant. As detailed in item c of paragraph 7 above, this comprised of a series of emails to and from the Council's legal department relating to the complaint investigation that was undertaken. Concerning the memorandum from the Monitoring Officer to the Assessment Sub-Committee dated 3 March 2009 the Council confirmed that this does not form part of item a and has not to date been provided to the complainant. It explained that it is information which falls within the scope of the complainant's request which was currently being withheld under section 41 of the Act. In respect of the report itself (item a) the Council advised that it did not consider the exemption provided by section 40(2) of the Act when issuing its Refusal Notice to the complainant.
14. The Commissioner wrote to the Council on 23 March 2010. He informed the Council that the requested information contains personal data and asked it to consider the exemption provided by section 40(2) of the Act and whether this applied. Regarding the application of section 42 of the Act, the Commissioner asked the Council to explain in more detail why this applies to item c of the withheld information.
15. The Council responded on 9 April 2010. It advised that it had now considered section 40(2) of the Act and was of the view that this applies to items a and b. Concerning item c, the Council explained in more detail why it is of the opinion that this information is exempt from disclosure under section 42 of the Act.

16. The Commissioner wrote to the complainant on 9 June 2010 to outline his preliminary view. He advised the complainant that he had considered the contents of the requested information and believed items a, b and c are exempt from disclosure under section 40(2) of the Act. The Commissioner asked the complainant to consider withdrawing her complaint in light of this view.
17. The complainant contacted the Commissioner on 16 June 2010 to inform him that she was unwilling to withdraw her complaint and to advise that she did not agree that the requested information was exempt from disclosure under section 40(2) of the Act. The complainant stated that she wished to make some final comments before the matter progressed to Decision Notice and agreed to submit these by 15 July 2010.
18. The complainant wrote to the Commissioner on 12 July 2010 to request an extension and to seek further clarification in respect of section 40(2) of the Act and the Council's ability to claim a late reliance on this exemption.
19. The Commissioner responded on 13 July 2010 agreeing to a final extension to 30 July 2010 and to provide the clarification the complainant required.
20. The complainant submitted her final comments on 28 July 2010. She explained in further detail why she is of the view that the requested information should be released and outlined her dissatisfaction with the Council's handling of this matter.

## **Analysis**

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### **Exemptions**

21. As outlined in paragraph 14 above, the Commissioner asked the Council to consider the exemption provided by section 40(2) of the Act, as it was clear to him having obtained a copy of the requested information that it contains personal data. As detailed in paragraph 18 above, the complainant raised concerns about the Council's ability to claim a late reliance of an exemption not previously cited and the Commissioner's jurisdiction to consider exemptions not previously referred to by a public authority.
22. In the Information Tribunal hearing of *Dr Peter Bowbrick v ICO and Nottingham City Council (EA/2005/006)* the Tribunal stated that the

Commissioner is entitled to consider exemptions not referred to by a public authority in appropriate cases, particularly in those cases where there is a data protection issue. The Tribunal stated:

"..The IC is in the position of being the guardian of both the rights of data subjects under the Data Protection Act 1998 (DPA) and of the rights of people seeking information under FOIA. If the Commissioner considered that there was a s.40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects. Otherwise it would put the Commissioner in a very strange position where the Commissioner is responsible for both freedom of information compliance and data protection compliance. S.40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects. Therefore it would be a very curious situation if the Commissioner had to forget about his data protection enforcement role when he had his freedom of information hat on." (Paragraph 51)

23. Following this Information Tribunal decision, the Commissioner is satisfied that he is able to consider the late reliance on section 40(2) of the Act in this case. He will therefore now go on to consider in more detail the application of this exemption to the withheld information.

#### **Section 40 – personal data**

24. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the DPA.
25. In this case, the Council argued that the requested information is the personal data of a third party and that disclosure under the Act would breach the first data protection principle of the DPA.
26. Firstly, the Commissioner must consider whether the requested information is personal data. Personal data is defined in Section 1 of the DPA as follows:

““personal data” means 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.”

27. Item a is an investigation report into a complaint against a parish councillor. It discusses the allegations made, the investigation undertaken, the conduct of the parish councillor and the outcome of the investigation. Similarly, item b is a memorandum to the Assessment Sub-Committee detailing the investigation undertaken into the parish councillor and the options for the Committee to consider regarding the complaint raised. Both items are about the parish councillor and her conduct; for this reason the Commissioner is satisfied that items (a) and (b) constitute the personal data of the parish councillor in question.
28. Item c is a series of emails involving the Council’s legal department relating to the investigation that was undertaken into the parish councillor. As these emails focus on and discuss the investigation and were only created as a result of the complaint made against the parish councillor, the Commissioner is satisfied that this information constitutes the personal data of the parish councillor in question.
29. Secondly, the Commissioner must establish whether disclosure of that data would breach any of the data protection principles under the DPA. As stated above, the Council claimed that disclosure would breach the first data protection principle.
30. The first data protection 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.”
31. In its submissions to the Commissioner the Council stated that disclosure would be unfair, as the requested information was obtained by the Council for the purpose of conducting a complaint investigation under the Standards Framework into the parish councillor. It was not obtained for wider public disclosure.

32. As stated previously, in this case, the requested information relates to an investigation undertaken by the Council into the conduct of a parish councillor following a complaint that was raised by the complainant. The requested information discusses the allegations made against the parish councillor, her conduct and details the investigator's decision following the investigation undertaken. When considering information relating to disciplinary matters or issues of conduct concerning an individual in a public role, it is the Commissioner's view that such information carries a general expectation of privacy due to its very sensitive nature and likelihood that disclosure could cause the data subject (the parish councillor in this case) distress and damage to their reputation.
33. It is important to highlight that disclosure under the Act effectively means disclosure to the world at large. If disclosure were ordered in this case, it would place personal information relating to the parish councillor; the allegations made and any decision reached about her conduct into the public domain. This would be potentially unfair and an unwarranted intrusion of privacy. As stated above, such public disclosure would be likely to cause the parish councillor distress and possibly lead to damage to her reputation.
34. The Council referred the Commissioner to the specific requirements of Section 63 of the Local Government Act 2000 (as amended by The Standards Committee Regulations 2008) in respect of disclosure of this type of information. The Council stated that information obtained by Monitoring Officers in the performance of their functions regarding Standards investigation must not be disclosed unless:
- The disclosure is made for the purposes of enabling a standards committee or sub-committee to perform any functions in connection with the investigation and consideration of an alleged breach of an authority's code of conduct.
  - The person to whom the information relates has consented to its disclosure.
  - The information has previously been disclosed to the public with lawful authority.
35. As stated in paragraph 8 above, the Commissioner has no jurisdiction to consider whether the requested information should be released to the complainant under this legislation. However, he notes that there is clear guidance in place for public authorities undertaking investigations of this nature about the use and disclosure of this type of information. It is the Commissioner's view that such investigations are undertaken with an element of privacy and confidentiality and therefore the parish councillor would have a reasonable expectation that information



relating to the investigation undertaken into her conduct would not be released into the public domain.

36. The Commissioner accepts that there is a legitimate interest in the disclosure of this type of information. He accepts that parish councillors are in a public role with the responsibility of looking after their local area and representing the local community. If there is any issue with a parish councillor's conduct or ability to undertake this role, there is an interest in ensuring such issues are investigated and knowing what action if any has been taken. However, the Commissioner considers, in this case, the Council has already gone some way to addressing this interest. He notes that the complainant (both in this case and the Standards Investigation) was informed of the outcome of the investigation and received a summary of the investigation, the outcome and why this was reached. The complainant is the Chair of the parish council in question and the Commissioner understands that any information she has received from the Council on this matter has been communicated to interested constituents.
37. As stated previously, any further disclosure would be into the wider public domain and it is the Commissioner's view that this would be an unwarranted intrusion into the professional life of the parish councillor in this case.
38. For the reasons explained above, the Commissioner is satisfied that disclosure of the requested information would be unfair and in breach of the first data protection principle. He has therefore concluded that section 40(2) of the Act is engaged in this case.
39. As section 40(2) of the Act is an absolute exemption, there is no need for the Commissioner to go on and consider the public interest test.
40. As the Commissioner has found that all the withheld information is exempt from disclosure by virtue of section 40(2) of the Act, there is no need for him to consider the Council's former reliance on sections 41 and 42 of the Act.

### **Procedural Requirements**

41. The Council failed to cite in its refusal notice an exemption on which it later relied; section 40(2) of the Act. The Commissioner has therefore found that the Council was in breach of section 17(1) of the Act in this case.

## **The Decision**

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42. The Commissioner's decision is that the Council dealt with the following aspects of the request for information in accordance with the Act:
- The Council acted appropriately by withholding the requested information under sections 40(2) of the Act.
43. The Commissioner's decision is that the Council did not deal with the following aspect of the request for information in accordance with the Act:
- the council breached section 17(1) of the Act due to its late reliance on section 40(2) of the Act.

## **Steps Required**

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44. The Commissioner requires no steps to be taken.

## Right of Appeal

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45. 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 sent.

**Dated the 25<sup>th</sup> day of August 2010**

**Signed .....**

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

## **Legal Annex**

### **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 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 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 41(1)**

Provides that –

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and

- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

**Section 42(1)**

Provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."