

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 07 September 2010

Public Authority: Stroud District Council
Address: Ebley Mill
Stroud
Gloucestershire
GL5 4UB

Summary

Following the identification of a significant overspend in the Housing Revenue Account of Stroud District Council (the "Council"), the complainant requested information relating to the retirement of the former Strategy Director, one of the key officials apparently charged with overseeing the account. Although the Council provided some information relating to the request, it refused to release details of the retirement package pursuant to section 40(2) of the Freedom of Information Act 2000 (the "Act"). The Commissioner is satisfied that disclosure of the requested information would not be fair for the purposes of the first data protection principle. The exemption provided by section 40(2) is therefore engaged and the public authority is not required to take any steps. The Commissioner, however, finds the Council to have breached sections 17(1), 17(1)(b) and 17(1)(c) of the Act in its handling of the 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. Towards the end of the financial year ending 31 March 2009, Stroud District Council identified a significant and unpredicted overspend on its Housing Revenue Account (HRA). Following greater scrutiny of the HRA, it was found that the *“overall outturn position on the HRA was £873,000 overspent.”*¹
3. At the end of April 2009, the Council alerted KPMG, a company with auditing expertise, of its concerns regarding the scale of the overspend. KPMG subsequently published a report outlining its findings in August 2009. As part of the report, KPMG was critical of the culture adopted by the housing service at the Council. This touched on the significant role of the Strategic Director in managing the HRA and his apparent failure to ensure that its budget was appropriately administered.

The Request

4. On 5 October 2009, the complainant wrote to the Council about the publicised overspend of its HRA. As part of his submissions, the complainant contended that the Council would have been aware of the potential overspend at an earlier stage than suggested. At the conclusion of his letter, the complainant put the following to the Council:

“My questions would focus on the timing of events and how they squared with the potential overspend, as follows:

- (1) When did the Director of Housing take early retirement?*
- (2) [(a)] What package was he offered, [(b)] by whom?”*

5. The Council replied to the request on 15 October 2009. In regards to part 1 of the request, the Council informed the complainant of the date of the last day of work of the Strategic Director, as well as the effective date of his retirement. Turning to the second part of the request, the Council stated that:

“The Director’s retirement had been dealt with by the Chief Executive (as line manager) and the Head of Human Resources in accord with the

¹ KPMG report, “Housing Revenue Account overspend” Stroud District Council. August 2009. Audit 2008/09

Council's policy and the provisions of the Gloucestershire Local Government Pension Fund administered by the County Council."

6. At this stage, the Council did not indicate that it was seeking to withhold any information relating to the Director's retirement package, nor did it include details of its complaints procedure in the event that the complainant was unhappy with its response.
7. The complainant wrote to the Council again on 19 October 2009 to advise it of his dissatisfaction at the level of information provided to him.
8. In its correspondence of 20 November 2009, the Council sought to address the points raised by the complainant in a number of separate letters, including the one dated 19 October 2009. Apparently constituting its formal refusal notice, the Council commented that:

"On your question of the 'retirement package' offered to the Strategic Director, the Council does not disclose information relating to the individual officers' retirement as this information constitutes personal data and is therefore exempt from disclosure under section 40 'Personal Data' of the Freedom of Information Act 2000."
9. On 23 November 2009, the complainant notified the Council of his view that it was *"morally bankrupt"* in refusing to disclose the requested information.
10. The Council wrote to the complainant on 1 December 2009 to advise him that, in light of his previous comments, it would be carrying out a review of the way that his information request had been processed. In its subsequent letter of 17 December 2009, the Council informed the complainant that it had upheld its refusal under section 40 of the Act.

The Investigation

Scope of the case

11. On 18 December 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

"...I find it difficult to accept that anyone working in the public sector can be rewarded for doing his job badly : that the costs of his reward

are not in the public domain. The extra costs involved – in providing anyone early retirement (with enhanced years of service added) are a burden on the taxpayer / council taxpayer that have not been earned.”

12. The complainant has informed the Commissioner during the course of his investigation that, in regards to parts 1 and 2(b) of the request, he is satisfied that the Council has fully discharged its duty to respond under the Act. The Commissioner has therefore focused on whether, in respect of part 2(a) of the request, the Council was entitled to withhold details of the former Strategic Director's retirement package.

Chronology

13. The Commissioner wrote to the complainant on 16 February 2010 to ask whether the complainant wished to pursue his complaint in light of previous decisions which had afforded retirement details a high degree of confidentiality.
14. On 24 February 2010 the complainant wrote to the Commissioner to advise him that, while he agreed with the general principle of withholding retirement information, he did not believe it was an acceptable position in this case.
15. In his letter of 4 March 2010, the Commissioner wrote to the Council to ask for further information about the nature of the retirement package received by the former Strategic Director.
16. The Council responded to the Commissioner on 15 April 2010. As part of its submissions, the Council enclosed an extract of its retirement policy and a copy of the report issued by KPMG on the HRA overspend, referred to in paragraph 3 above.
17. On 14 May 2010 the Commissioner telephoned the complainant. During the course of the conversation, the complainant expressed the reasons why he believed the public should be made aware of the funds received by public officials upon retirement. He also queried the completeness of the Council's response in regards to part 2(b) of his request.
18. The Commissioner subsequently telephoned the Council on 17 May 2010 to request additional clarification concerning the retirement of the former Strategic Director. This Council responded to the request on 27 May 2010.
19. In light of the information received, the Commissioner telephoned the complainant on 15 June 2010. During the conversation, the

complainant framed the issues that should be considered by the Commissioner, specifically in regards to part 2(a) of the request.

Analysis

Exemptions

Section 40(2)

20. Section 40(2) of the Act (the full wording of which is included in the legal annex, as are all sections referred to in this notice) provides an exemption to the right to access recorded information where it is the personal data of any third party. In order for a public authority to rely on section 40(2), it would have to be satisfied that:

- the requested information was the personal data of the former Strategic Director; and
- disclosure of that information would contravene a data protection principle contained in the Data Protection Act 1998 (DPA)

21. The Commissioner addresses each of these points in turn.

Is the requested information personal data?

22. The Commissioner is satisfied that the requested information directly relates to the financial affairs of a clearly identified individual. The Commissioner therefore accepts that the withheld information would be the personal data of the former Strategic Director. However, having considered the nature of the information, the Commissioner has determined that details of the retirement package would not constitute 'sensitive' personal data for the purposes of the DPA.

Would disclosure contravene a data protection principle?

23. Although not directly referred to by the Council, the Commissioner considers that the relevant data protection principle is the first. This requires the processing of personal data to be both fair and lawful. The Commissioner's considerations here focus on the general issue of whether disclosure of the former Strategy Director's retirement package would be fair.

Fairness

24. In establishing whether disclosure is fair, the Commissioner has looked to balance the consequences of any release of personal data and the reasonable expectation of the data subject with general principles of accountability and transparency.
25. To guide him when weighing up these competing interests, the Commissioner has borne in mind the following factors:
 - i. The consequences of disclosure
 - ii. The data subject's reasonable expectations of what would happen to their personal data
 - iii. The balance between the rights and freedoms of the data subject and the legitimate interests of the public.

The consequences of disclosure

26. In this case, it is not clear that the disclosure of the requested information would be likely to cause the former Strategic Director harm or subject him to threats or harassment. However, the Commissioner recognises that the release of the information would be an intrusion into the financial circumstances of the individual in question. Therefore, the Commissioner believes it more than probable that disclosure would cause some distress to the data-subject.

Reasonable expectations

27. Given the nature of the information, which is connected to the financial arrangements put in place between the Council and the former Strategic Director, the Commissioner considers there would naturally be a level of sensitivity attached to the requested records.
28. The Commissioner is therefore satisfied that, even in the absence of a specific confidentiality clause, there would nevertheless be an assumed right to privacy between an employee and an employer in respect of a retirement package.
29. However, the Commissioner understands that the more senior a member of staff is, the greater the chance that they will be responsible for making influential policy decisions and decisions that will directly affect the expenditure of significant amounts of public funds. The Commissioner has therefore previously held that the greater the seniority of a role, the less likely it is that disclosing information about an individual's public duties will be unwarranted or unfair.

30. In this instance, the Commissioner would have no doubt that, as a senior employee of the Council, the former Strategic Director would have recognised that his actions would be subject to an intense level of scrutiny. This is evidenced by KPMG specifically referring to the former Strategic Director, in its report of August 2009, as forming part of the managerial strata that oversaw the HRA overspend.
31. While therefore accepting the senior status of the former Strategic Director, the Commissioner has also gone on to consider the nature of the requested information itself.
32. In his guidance on the exemption provided by section 40(2), the Commissioner has drawn a distinction between information concerning the public life of an employee at a public authority and information about the employee's private life. The Commissioner has emphasised that disclosure of information should normally only relate to an employee's official functions and responsibilities, where decisions or actions may be accountable to the public they serve.
33. In his decision involving Lancaster Council (FS50150198), the Commissioner considered the status of information relating to the early retirement of a former town clerk at the authority. In that case, the Commissioner remarked:

"It is clear that pension arrangements are directly linked to an employee's work at an authority. However, the personal nature of the information would extend beyond information about the former town clerk's official capacity as a public servant and into the private finances of the individual."
34. The Commissioner considers that the above view would have similar resonance in the circumstances of the case presented here.

The rights of the individual versus the legitimate public interest
35. In seeking to balance the competing interests of the individual's right to privacy against the public interest in disclosure, the Commissioner has weighed up parts i and ii of the factors referred to in paragraph 25. On the face of it, there would seem to be a significant public interest in knowing the basis on which an official had taken his retirement given his role in the HRA overspend and the criticism of his involvement in the KPMG report.
36. Yet, the Commissioner does not believe that the public interest generated through the HRA overspend would necessarily translate itself into a legitimate public interest in the retirement of the former

Strategic Director. This is because insight into the terms of the individual's retirement would not allow the public to better understand how the overspend was allowed to come about.

37. Nevertheless, the Commissioner acknowledges that, as the Council has a fiduciary duty to its taxpayers, there will be an essential public interest in knowing how public money is spent. This will include ensuring that an authority is effectively overseeing the terms of a retirement of one of its employees.
38. The Commissioner, however, has not been presented with any evidence from the complainant that would suggest that the Council has not applied itself properly in regards to the retirement of the former Strategic Director. Furthermore, the Commissioner has been informed that both the internal and external auditors of the Council would have access to scrutinise the terms of the retirement. This would appear to demonstrate that a system is in place to regulate the retirement packages offered to officials at the Council.
39. The Commissioner therefore considers that, allowing for the personal nature of the requested information, its disclosure would be disproportionate in view of the rights of the former Strategic Director to privacy.
40. In light of the arguments presented above, the Commissioner has concluded that it would not be fair to release further information relating to the retirement of the former Strategic Director. As the Commissioner is satisfied that providing the requested information would contravene the first data protection principle, he has not gone on to consider the other data protection principles.

Procedural Matters

Section 17(1)

41. Section 17(1) requires that, where a public authority wishes to rely on any exemption from part II of the Act, it should issue a notice specifying the exemption and stating why the exemption would apply. In accordance with section 10(1) of the Act, this notice must be issued within 20 working days of receipt of the request.
42. By failing to issue an appropriate refusal notice within the statutory time limit, the Commissioner finds the Council in breach of section 17(1) of the Act. In addition, the Commissioner considers the Council to have breached sections 17(1)(b) and 17(1)(c) by failing to specify

within 20 working days the exemption it would later seek to rely on or the reasons why the exemption would apply.

The Decision

43. The Commissioner's decision is that the public authority correctly withheld information relating to part 2(a) of the complainant's request.
44. However, the Commissioner has also decided that the public authority breached sections 17(1), 17(1)(b) and 17(1)(c) of the Act by failing to issue an appropriate refusal notice within 20 working days of receipt of the request.

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. 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.

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 sent.

Dated the 07 day of September 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

Freedom of Information Act 2000

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

Personal Information

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.

The Data Protection Act 1998

Interpretative provisions

Section 1(1) provides –

In this Act, unless the context otherwise requires –

“data” means information which –

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“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;

“processing”, in relation to information or data, means obtaining, recording, or holding the information or data or carrying out any operation or set of operations on the information or data, including –

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

“relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

Section 1(2) provides –

In this Act, unless the context otherwise requires –

- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
- (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

Section 1(3) provides –

In determining for the purposes of this Act whether any information is recorded with the intention –

- (a) that it should be processed by means of equipment operation automatically in response to instructions given for that purpose, or
- (b) that it should form part of a relevant filing system,

It is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

Section 1(4) provides –

Where personal data are processed only for the purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

Section 2 provides –

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

- (a) the racial or ethnic origin of the 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 or 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, such as the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1

The Data Protection Principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

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

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 the 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.