

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 January 2011

Public Authority: Neath Port Talbot County Borough Council
Address: Civic Centre
Port Talbot
SA13 1PJ

Summary

The complainant requested the addresses of all council owned houses and flats in the Neath Port Talbot borough. The Council refused this request on the basis of section 40(2) of the Freedom of Information Act 2000. The Commissioner has investigated this case and finds that section 40(2) of the Act is not engaged and that the Council incorrectly withheld the information requested. The Commissioner also finds a number of procedural breaches in the way the Council's handled 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. At the time of the request, the Council was making arrangements to ballot its tenants in relation to the potential stock transfer of its housing to Neath Port Talbot Homes Ltd. A campaign group was running simultaneously for the retention of council owned housing and the complainant requested this information on behalf of that campaign group.

The Request

3. On 29 June 2009 the complainant requested the following information from the Council:

"...the addresses of all council houses and flats in the Neath Port Talbot borough. I would add that I am making NO request for the names of the occupiers of these addresses."

4. On 10 July 2009 the Council contacted the complainant and informed him that the Council currently had 9272 tenanted properties and to disclose a full list of those properties would create a document equivalent to 273 pages of A4 paper. The Council issued a fees notice under section 9 of the Act and informed the complainant that on receipt of payment of £27.30 (excluding postage) it would provide the information.

5. On 19 August 2009 the complainant contacted the Council and enclosed a cheque for payment of the fee.

6. On 23 December 2009 the Council wrote to the complainant, informing him that:

"The Council is presently considering your request and seeking to take into account all appropriate factors in coming to a decision on the matter."

7. The Council also expressed concern about the release of information to third parties given what it considered to be the "vulnerable nature of the majority of tenants". Additionally, the Council asked the complainant a number of questions including the purpose of the request and the administrative arrangements he would undertake to protect any released personal information.

8. On 7 January 2010 the complainant wrote to the Council expressing concern at the delay in sending him the information and reminded the Council that he had paid for it in September 2009. The complainant also confirmed that:

"It is the intention of our campaign to deliver to tenants the arguments against stock transfer."

9. On 20 January 2010 the Council informed the complainant that it had contacted the Commissioner to seek his view on this matter.

10. The Council provided a substantive response to the complainant on 1 February 2010. It informed him that the request was considered on the basis of the release of the addresses of vulnerable individuals and stated:

"The Council believes that the release of that information would be the release of personal information and would be detrimental to the individuals/families involved."

11. The complainant was also informed that the Council had considered releasing the addresses of those persons not considered to fall within the definition of 'vulnerable'. However, it had concluded that such an exercise would exceed the appropriate cost limit. The information was also therefore refused on the basis of section 12(1) of the Act.
12. On 4 February 2010 the complainant contacted the Council and requested an internal review of its decision not to disclose the information requested.
13. On 26 February 2010 the Council informed the complainant that it had contacted the Commissioner regarding this complaint and was awaiting his response.
14. The Council communicated the outcome of its internal review on 12 March 2010. The Council informed the complainant that it:

"...cannot determine this complaint without a decision from the Information Commissioner on the issues raised with him."

The Investigation

Scope of the case

15. On 22 January 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
16. The Commissioner's investigation considered whether the Council's application of the section 40(2) exemption was correct. He also considered the Council's procedural handling of the request.

Chronology

17. On 18 June 2010 the Commissioner contacted the Council. He informed it that his preliminary view was that the information should be

disclosed. The Commissioner also informed the Council that he was not persuaded that redacting the addresses of 'vulnerable' tenants was necessary as it was not clear what distress or harm would result from disclosure.

18. It was agreed that the Council would reconsider its application of section 40(2) and provide a substantive response to the Commissioner by 16 July 2010.
19. The Council provided a substantive response on 16 July 2010 in which it confirmed that it remained of the view that the list as a whole should not be released:

"...because of general unfairness to tenants; but in particular, because of the effect on vulnerable tenants... and the complications for an overall disclosure arising from their numbers."

20. The Council argued that it was not the reasonable expectation of a council tenant to have the fact of their tenancy revealed to third parties and it made reference to a number of Decision Notices (see paragraphs 43 to 46 for further details) previously issued by the Commissioner which it felt had strong parallels with this case.
21. The Commissioner responded on 13 August 2010 and highlighted some significant differences between the Decision Notices referred to by the Council and this particular case. He also informed the Council that he did not consider that it had demonstrated the harm that may arise from the disclosure of the addresses of 'vulnerable' tenants. The Commissioner added that if the Council could demonstrate the harm or distress that may result from disclosure of the address of a specific property or properties, he would consider arguments for the redaction of these addresses. He did not however consider that the Council could reasonably claim that over half, or indeed 'most', of its tenants fell into this category.
22. On 16 September 2010 the Council issued a detailed letter to the Commissioner questioning his stance. In view of the fact that the Commissioner had already allowed the Council a further opportunity to respond to his preliminary view, the Commissioner felt it expedient to draw the correspondence to a close and to proceed to a Decision Notice in respect of this complaint.

Analysis

Exemptions

Section 40(2)

23. The full text of section 40 of the Act is available in the Legal Annex at the end of this Notice.
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.

Is the requested information personal data?

25. Personal data is defined at section 1(1) of the Data Protection Act ('the DPA') as:

"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, 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."*

26. Following the former Information Tribunal's decision in the case of *England and London Borough of Bexley v Information Commissioner (EA/2006/0060 & 0066)* the Commissioner is satisfied that the address of a residential property constitutes personal data as outlined below.
27. If the address of a property is known, it is possible in many cases to identify the owner or tenant from other information which is in the public domain; for example, Land Registry, the electoral roll or talking to neighbours of that property. More obviously, in the hands of the Council itself it is possible to identify an owner and / or tenant from the address of a property as the addresses of properties are held with ownership details on the Council Tax register.
28. However, the fact that the information constitutes personal data does not automatically exclude it from disclosure. The second element of the

test is to determine whether disclosure would contravene any of the data protection principles.

Would disclosure contravene a data protection principle?

29. The Council has argued that the disclosure of a list of addresses of its properties would contravene the first principle of the DPA which states that the disclosure of personal data must be fair:

“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.”*

Fairness

30. In his consideration of whether disclosure of the list of council addresses would be fair, the Commissioner has had regard for the following factors:

- The reasonable expectations of the data subjects.
- Whether disclosure would be likely to cause any unnecessary damage or distress to the data subjects.

31. The above two points will then be balanced against the legitimate interest of the general public being made aware of a list of Council owned properties.

The reasonable expectations of the data subjects

32. The Commissioner has considered the reasonable expectations of the data subjects in relation to the disclosure of their addresses as Council owned property. The Council has argued that persons becoming council tenants would not normally have the expectation that their identity as council tenants would be disclosed by the local authority and would expect that the information would be used solely for administration purposes.
33. The Commissioner accepts that the data subjects might not have reasonably expected that their personal information would be disclosed. However, he does not consider that this automatically makes disclosure unfair.

34. The Commissioner is also notes that this case has been publicised in the local press and the Commissioner is mindful that there have been objections from a small number of the data subjects and has therefore considered the issue of consent.
35. When considering the issue of consent, the Commissioner's view is that any refusal to consent is not absolutely determinative in the decision as to whether the data subject's personal data will be disclosed. Where the data subject consents to the disclosure of their personal data within the time for statutory compliance with the request, then this disclosure will generally be considered fair.
36. However, in all other circumstances, the Commissioner will take the data subjects comments into account insofar as they represent an expression of views of the data subject at the time of the request had the data subject given any thought to the issue at the time. These views help form the analysis of fairness.
37. The Commissioner has taken the objections to disclosure into account in his consideration of the reasonable expectations of the data subjects. However, the Commissioner has not been provided with any reasons that set out why, at the time of the request, the individual data subjects considered disclosure would be unfair.

Would disclosure cause any unnecessary damage or distress to the data subjects?

38. The Commissioner notes that the request was for a full list of addresses of all council owned properties. The complainant did not ask for a sub-set of information which may have allowed the requestor to deduce additional information about the data subjects from the list.
39. However, in its consideration of this request, the Council originally relied on the following two Decision Notices issued by the Commissioner relating to similar requests for information: Mid Devon District Council (reference FS50082890) and Braintree District Council (reference FS50066606). The Council had particular concerns in relation to the disclosure of any of its addresses where the tenants could be identified as 'vulnerable' in some way due to age, disability, dependence on benefits or other reasons, as it believes disclosure would be detrimental to the individuals or families involved.
40. However, the Commissioner believes that the Council has misinterpreted these Notices. For example, in the Braintree District Council case the Commissioner concluded that whilst there would be unfairness to individuals if they were publicly identified as members of

a vulnerable group, he did not consider that there would be any general unfairness to individuals being identified as council tenants. Furthermore, he was mindful of the low inherent sensitivity of the data and of the fact that in practice the fact that a particular property is or is not owned by the Council will usually be known to neighbours or because it is part of a known council housing estate.

41. Further, the Commissioner indicated (in the Braintree case), that he was willing to accept that:

"...in theory there may be particular properties which are not generally known to be owned by the Council, the disclosure of the addresses of which might result in unfairness to some individuals."

The Commissioner had in mind circumstances where the Council had housed some vulnerable individuals at a secret location and this fact could be inferred from the address. In such circumstances, the Commissioner would accept that this information could be withheld, although in the present case he has no reason to suppose that this is a particular issue.

42. The Commissioner also accepts that many of the Council's tenants are likely to fall within the definition of 'vulnerable' tenants. However, it should not be inferred from this Notice that disclosure of a general list of the Council's properties automatically identifies tenants of those properties as 'vulnerable'. Indeed, the Commissioner refutes this interpretation and in the absence of any specific arguments in support of this from the Council the Commissioner is not persuaded by this view.
43. In its subsequent responses to the Commissioner, the Council relied on three further Decision Notices that it considered to mirror the circumstances of this particular case and in which the Commissioner had ruled that the information requested should be withheld. The Council took the view that the Commissioner's preliminary view in this case was inconsistent with these previous Notices. Again, the Commissioner believes that the Council has misinterpreted these Notices and notes that the information requested in each case differed significantly from the request to which this Notice relates.
44. For example, in case reference FS50115331 the information requested was for a list of all Community Housing Group properties under the local authority and in particular, details of tenants evicted; including their names, dates and reasons for eviction.

45. Similarly, in case references FS50136509 and FS50147437 although both cases concerned individual addresses, they also related to rent arrears and council tax status respectively, as opposed to general lists of tenanted properties.
46. The Commissioner believes that it would be difficult to dispute that the disclosure of the details (including addresses) of tenants who had either been evicted or incurred rent arrears would be unfair. He also considers that information about the council tax status of individuals goes considerably further than the disclosure of a list of Council owned property.
47. The Commissioner does not therefore accept that his view in this particular case was inconsistent with his previous decisions and neither is he persuaded that disclosure of the information would by itself identify tenants as 'vulnerable' individuals. The Commissioner has therefore concluded that disclosure of the information would not cause unwarranted harm or distress to the to the data subjects.

Is there a legitimate public interest in disclosure

48. The Commissioner believes that there is a legitimate public interest in ensuring that council tenants voting on a possible stock transfer of Council property are fully informed of both the advantages and disadvantages of such a decision. The complainant requested this information to provide the tenants with the arguments against the stock transfer. The Commissioner also believes that there is a legitimate public interest in ensuring that the conduct of a campaign which may result in the sale of a significant part of the Council's assets is seen to be both transparent and accountable to the wider community within the Council's boundaries. The Commissioner is therefore satisfied that there is a legitimate public interest in disclosure.
49. Even though the Commissioner accepts that the Council tenants would not necessarily have had any expectation that the details of the addresses would be disclosed, he is not persuaded that there would be any harm or distress to the data subjects from disclosure of the information. Added to this, the strong legitimate public interest in disclosure of the information the Commissioner has concluded that disclosure would not in fact be unfair. The Commissioner has therefore gone on to consider Schedule 2, condition 6 of the DPA.

Schedule 2 Condition 6 of the DPA

50. 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 considers that the relevant condition in Schedule 2 in this particular case is the sixth condition which 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."

51. The Commissioner's awareness guidance on section 40 states that following the former 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 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 interests of the individual.

Legitimate interest in disclosure

52. The Commissioner has already highlighted in paragraph 48 of this Notice that there is a strong legitimate interest in disclosure of the withheld information.

Is disclosure necessary for the legitimate interests of the public?

53. The Commissioner has considered whether there was any alternative means other than the disclosure of the withheld information to meet the legitimate interests identified in paragraph 48 of this Notice. The Commissioner considers that the Council could have been asked to present the arguments to the Council tenants themselves. However, the campaign group would not have had confidence in the Council to do this. He has also considered whether the campaign group could have obtained the same result (targeted all Council addresses within its boundaries) by advertising meetings. However, the Commissioner considers that this would not have reached the full target audience and only a proportion of those it reached would actually be prepared to attend a meeting. The Commissioner has therefore concluded that there was not an alternative means other than the disclosure of the withheld information.

Would disclosure cause unwarranted interference to the rights and freedoms of the legitimate interests of the data subjects?

54. The Commissioner has already weighed the consequences of disclosure in this case against the legitimate public interest in disclosure in paragraphs 38 to 47 of this Notice. As he is also of the opinion that disclosure is necessary to meet the legitimate public interest he has concluded that condition 6 of Schedule 2 of the DPA is met in this case.

Lawfulness

55. In the context of freedom of information requests, the Commissioner considers it is likely that it will be unlawful to disclose personal information where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence. In this case he has seen no evidence that any of these breaches would occur and he has consequently concluded that disclosure would not be unlawful.
56. For all of the above reasons, the Commissioner has concluded that section 40(2) of the Act is not engaged.

Procedural Requirements

Section 10 – Time for compliance with the request

57. Section 10(2) of the Act states that where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2) of the Act, the working days between the day the fees notice is given and when the fee is received by the authority can be disregarded when calculating the statutory period for response. However, even taking this into account, the Council's failure to provide the requested information within 20 working days of receipt of payment represents a breach of section 10(1) of the Act.

Section 17 – Refusal of request

58. Section 17(1) provides that an appropriate refusal notice should be issued within twenty working days of receipt of the request. As the Council failed to do this it breached section 17(1) of the Act.
59. Section 17(1)(b) states that the Council must specify the exemption(s) it is relying on for withholding the requested information. Although the Council informed the complainant that it considered the information to be third party personal information it did not cite the section 40(2) exemption and its failure to do so represents a breach of section 17(1)(b) of the Act.

60. Section 17(1) provides that an appropriate refusal notice should be issued within 20 working days of the receipt of the request. In failing to respond within 20 working days of receipt of the request with the section 12(1) refusal, the public authority failed to comply with the requirement of section 17(5).

The Decision

61. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- It incorrectly applied section 40(2) to withhold the information requested.
 - It breached section 10(1) for failing to provide the information following payment by the complainant of the requested fee.
 - It breached section 17(1) for failing to issue a refusal notice within 20 working days of the request.
 - It breached section 17(1)(b) for failing to cite an exemption under Part II of the Act which it later relied on.
 - When relying on section 12(1) of the Act, it breached section 17(5) for failing to issue a refusal notice within twenty working days from receipt of the request.

Steps Required

62. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The Commissioner requires the public authority to provide to the complainant the information described in paragraph 3 of this Notice.
 - The Council may exclude from the list of addresses any property which is not obviously in Council ownership and which is owned by the Council for the purpose of housing individuals in secret locations. If any such exclusions are made, the Council must provide a fresh refusal notice to the complainant, stating the exemptions in the Act upon which it relies.
63. The public authority must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

64. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

65. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
66. The Commissioner notes that the Council declined to make a decision regarding this case at the internal review stage and recommended to the complainant that he should contact the Information Commissioner's Office.
67. The Commissioner notes that by failing to conduct a full internal review, the Council breached the section 45 Code of Practice.

Right of Appeal

68. 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 17th day of January 2011

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

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(2) states –

“Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

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.”

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-

- (c) it constitutes personal data which do not fall within subsection (1), and
- (d) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (e) 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-
 - (iii) any of the data protection principles, or
 - (iv) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (f) 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.”