Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 January 2011

Public Authority: Coventry City Council
Address: 1 Civic Centre
Little Park Street
Coventry
West Midlands
CV1 5RS

Summary

The complainant contacted Coventry City Council to request a copy of a named individual's report and the dates on which conversations took place between the public authority and employees of a named day care centre in relation to the care of her sister. The public authority refused to disclose the requested information under the provisions contained within section 40(2) of the Freedom of Information Act 2000 (the Act). The Commissioner has investigated and finds that the public authority should have neither confirmed nor denied whether information was held by virtue of the provision of section 40(5)(b)(i). The public authority also failed to issue a valid refusal notice under section 17(1) of the Act. He does not require the public authority to take any remedial steps in relation to 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.

The Request

2. On 10 August 2008 the complainant contacted the public authority to request the following information relating to the care of her sister at a named day care centre:

   "I would like to see copies of [name redacted]*'s reports from previous years…".*

3. On 30 August 2008 the public authority responded to the complainant stating that it did not hold written reports. It also stated that the concerns referred to in previous correspondence from the complainant were raised verbally by the day care centre staff with the public authority.

4. On 30 August 2008 the complainant contacted the public authority to request the following:

   "Please provide me with the dates these conversations took place, and with whom."

5. On 5 December 2008 the public authority refused to disclose the information on the basis of the exemption contained in section 40(2) of the Act.

6. On 6 December 2008 the complainant requested an internal review of the public authority's decision.

7. On 14 December 2008 the complainant contacted the public authority to repeat her dissatisfaction with the handling of her request and the responses the public authority had provided so far. The complainant also enquired as to whether the letter dated 5 December 2008 was the *"corporate response to the outstanding matters".*

8. On 15 December 2008 the public authority responded to the complainant stating:

   "You specifically asked below if the letter you received from [name redacted] *was the 'corporate response' – whilst this is not the language or phraseology that we would normally use, for the purposes of your question, the letter from* [name redacted] *of December 5th 2008 does constitute the Council's corporate response to your requests for information."*

The public authority later confirmed to the Commissioner that it had not carried out an internal review and therefore this response did not constitute the result of an internal complaints procedure being followed.

The Investigation

Scope of the case

9. The complainant brought a complaint under the Data Protection Act 1998 (the DPA) to the Commissioner regarding a subject access request that she had submitted to the public authority. The complainant then sought the remainder of the information that was not her own under the Act. The complaint regarding the public authority's handling of the information request was passed to the Commissioner on 26 March 2010 for consideration under the Act after work under the DPA was completed.

10. The complainant specifically asked the Commissioner to consider the following points:

- that the public authority had withheld the information from the second request as personal data of a third party;
- that the public authority had not responded within the statutory time limit; and
- that the public authority had claimed it did not hold the information requested in the first request.

Chronology

11. On 4 May 2010 the Commissioner wrote to the complainant to outline the scope of the case.

12. On 11 May 2010 the complainant responded to the Commissioner and raised a number of other issues with the scope of the case which she had outlined previously.

13. On 27 May 2010 the Commissioner responded to the complainant. He addressed the points raised in her previous correspondence and detailed his initial findings on the case. The Commissioner invited the complainant to withdraw her complaint if she accepted his initial findings.

14. On 15 June 2010 the complainant responded to the Commissioner reiterating concerns she had raised in previous correspondence, and informed the Commissioner that she did not wish to withdraw her complaint.

15. On 16 June 2010 the Commissioner responded to the complainant. He clarified the complainant's areas of concern and confirmed he would progress the case to a Decision Notice.

16. On 16 June 2010 the Commissioner wrote to the public authority to outline the scope of the case and invite it to provide any further arguments regarding its handling of the request along with answers relating to the Commissioner's 'information not held' investigation.

17. On 16 August 2010 the public authority provided a substantive response to the Commissioner.

Analysis

Substantive Procedural Matters

18. The full text of the relevant provisions of the Act referred to in this section is contained within the Legal Annex.

19. In considering whether the exemptions are valid, the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public.

20. In relation to the second request, the public authority did not apply section 40(5)(b)(i) but cited section 40(2) as grounds upon which to withhold the information requested. The public authority relied upon the fact that it considered the information to be the personal data of third parties as the reason not to disclose it. Even if it was not specific about exactly what information it held, it did indicate that it held information pertaining to the request. The Commissioner has decided that citing section 40(5) in relation to both requests was in fact the correct course for the public authority to have taken, for the following reasons.

Exemption: Section 40(5)

21. Section 40(5) provides an exemption from the duty to confirm or deny, for information which is the personal data of an individual other than the applicant. Although the public authority failed to consider this subsection, the subject matter of the case prompted the Commissioner to consider whether the public authority would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).

22. The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights are set out in the DPA, legislation which the Commissioner also regulates, and are closely linked to article 8 of the Human Rights Act. The Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without having considered these rights, even where the legislation has not been cited specifically.

23. Generally, the provisions of section 40(1) to (4) provide various exemptions relating to personal data of an individual other than the requester. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from confirming or denying that it holds information if to do so would itself contravene any of the data protection principles of the DPA.

24. The DPA defines personal information as:

'…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 intention of the data controller or any other person in respect of the individual.'

The Commissioner is of the view that whether or not information was held by the public authority – as a result of a complaint or concerns raised about a named adult's care, and the resulting investigation – any such information would constitute the personal data of the individuals involved.

25. He would therefore like to clarify that even confirming or denying whether information is held would reveal whether or not a complaint had been made or an investigation taken place, and this has resulted in him considering the case in a different manner to the public authority.

26. In light of the above, the Commissioner considers that the proper approach would be to first consider whether or not, in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a) (i.e. the duty to inform a requester whether it holds information of the description specified in the request).

27. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying information was held would contravene any of the data protection principles.

Would complying with section 1(1)(a) contravene the first data protection principle?

28. The first data protection principle states that:

"*Personal data shall be processed fairly and lawfully…".*

In considering whether or not confirming or denying information was held would contravene the first data protection principle, the Commissioner has taken into account the reasonable expectations of any data subjects who may be identifiable from the information, the legitimate interests of the public, and the rights and freedoms of any named individual or individuals.

29. The Commissioner is satisfied that individuals involved in the care of an elderly adult, and that elderly adult herself, would have a reasonable expectation of privacy. They would not expect the public to have access to information which discloses whether or not concerns had been raised or an investigation into the care of an elderly person had been undertaken.

30. The Commissioner understands that the public has a legitimate interest in knowing that professionals caring for elderly people are fit to practice. However, he also has to consider the individuals involved and their right to privacy. Whilst it may be true that the release of information could be useful to the public, for example when complaints are upheld, the Commissioner does not believe that the public interest

in disclosure in this case outweighs the unfairness to the data subjects involved.

31. The Commissioner is satisfied that confirming or denying whether this information was held would contravene the fairness element of the first data protection principle. Therefore, he has determined that the public authority should have applied the provisions of section 40(5)(b)(i) of the Act and neither confirmed nor denied holding the requested information.

32. Given this conclusion he has not gone on to consider the other data protection principles.

Procedural Requirements

33. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within the time for complying with section 1(1), i.e. within twenty working days.

34. In this instance the relevant requests were made on 10 and 30 August 2008. The public authority did not respond to the second request until 5 December 2008.

35. The Commissioner has therefore concluded that the refusal notice in the second request did not meet the requirements of section 17(1) of the Act.

The Decision

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36. The Commissioner finds that the public authority should have made a 'neither confirm nor deny' response, in accordance with section 40(5)(b)(i) of the Act. The Commissioner also finds that the public authority breached section 17(1) in failing to issue a refusal notice within the statutory time limit.

Steps Required

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37. The Commissioner requires no steps to be taken.

Other matters

38. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint.

39. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review.

40. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case the public authority failed to carry out an internal review after being asked to do so and communicate the outcome to the complainant despite the publication of his guidance on the matter.

Right of Appeal

41. 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 12th day of January 2011

Signed ……

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -
"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -
"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –
"Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –
"The information –

(a) in respect of which the applicant is to be informed under subsection 1(a) or,

(b) which is to be communicated under 1(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –
"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –
"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

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) 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-

(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)."

Section 40(6) provides that –
"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

Section 40(7) provides that –
In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"data subject" has the same meaning as in section 1(1) of that Act;
"personal data" has the same meaning as in section 1(1) of that Act.