

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 March 2011

Public Authority: Surrey Heath Borough Council
Address: Surrey Heath House
Knoll Road
Camberley
Surrey
GU15 3HD

Summary

The complainant asked Surrey Heath Borough Council ("the Council") to provide him with the names of those to whom a particular report was published as well as the dates when the publication occurred. The Council failed to respond initially but following the Information Commissioner's ("the Commissioner") intervention, issued a refusal citing regulation 12(4)(e) of the Environmental Information Regulations 2004 ("the EIR"). In its internal review, the Council also cited regulation 12(5)(f) and 13(1). During the Commissioner's investigation, the Council changed its position again when it advised the Commissioner that it wished to handle the request under the Freedom of Information Act 2000 ("the FOIA"). It sought to rely on section 40(2) of the FOIA. The Council subsequently disclosed a number of names along with relevant dates. However, the Council continued to rely on section 40(2) in relation to the names of six councillors who had not consented and the name of one individual who had left the employment of the authority. The Commissioner investigated and decided that although the FOIA did apply, section 40(2) was not engaged. He therefore requires the Council to disclose the information within 35 days. The Commissioner found breaches of section 1(1)(b), 10(1) and 17(1)(a)(b) and (c) of the FOIA.

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 FOIA. This notice sets out his decision

Background

2. The complainant in this case made a number of complaints to the Council regarding its handling of an incident that occurred in 2003 involving the felling of a number of trees. A report was created by the Council's Monitoring Officer dealing with the investigation into the complainant's complaints. A request for this report formed the subject of a separate complaint to the Commissioner considered under case reference FS50176219. The request that is the subject of this complaint concerns the names of those to whom this report was provided as well as the date when that occurred. The Commissioner understands that the complainant is currently involved in litigation proceedings against the Council concerning this particular report.

The Request

3. On 17 September 2009, the complainant wrote to the Council and requested information in the following terms:

"As you know, in June 2007 the Council published a Report compiled by the former Monitoring Officer, [name].

I would like you to let me know to whom this Report was published and the date when that publication occurred. I am particularly interested to know which Council Officers received a copy and when, or if any Councillors who did not receive their copies in June 2007, were subsequently given copies at a later date. Since the Report also included a copy of a letter sent to me, not to mention a considerable amount of my personal data, I am entitled to know to whom this material was provided".

4. When the Council failed to issue a valid refusal notice within 20 working days, the Commissioner intervened following a complaint from the complainant. He wrote to the Council on 30 November 2009 asking it to either provide the information or issue a refusal notice.
5. The Council did not issue its refusal notice until 5 February 2010. This stated that it wished to withhold the information using regulation 12(4)(e) of the EIR.
6. The complainant requested an internal review of the refusal on 10 March 2010. He stated that he did not agree that the request should be handled under the EIR or that the information he had asked for could not be provided.

7. The Council completed its internal review on 29 April 2010. It sought to rely on additional exceptions under regulation 12(5)(f) and 13(1).

The Investigation

Scope of the case

8. On 30 April 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly refused to provide the information he had requested.
9. During the course of the Commissioner's investigation, the Council disclosed some names along with relevant dates to the complainant. As this information has now been provided, the Commissioner considers that the complaint relating to this information has been informally resolved. It is therefore not addressed in the Analysis and Decision sections of this notice.

Chronology

10. On 1 June 2010, the Commissioner sent a standard letter to the Council, asking for copies of the withheld information. The Commissioner sent a further standard letter on 2 August 2010 asking for fuller arguments regarding why the information should be withheld.
11. On 9 September 2010, the Commissioner wrote to the complainant setting out his understanding of the complaint.
12. On the same day, the complainant replied confirming that the Commissioner had correctly understood his complaint.
13. On 10 September 2010, the Council responded to the Commissioner. It failed to provide the withheld information. It also stated that it now wished to withhold the information using section 40 of the FOIA.
14. On 13 September 2010, the Commissioner telephoned the Council to discuss its response. The Commissioner asked the Council if it could explain who the report had been provided to. It stated that the report had been provided to members of the "management board" and that councillors had been emailed to inform them that they could ask for a copy of the report. Those councillors who responded were provided with a copy. The Council also mentioned that a solicitors firm had also

- been provided with a copy of the report. The Commissioner explained that the Council needed to provide more detailed rationale to justify its refusal. The Commissioner asked the Council to consider disclosing the information to informally resolve the complaint and he asked for a response by the end of the week.
15. Following a significant delay, the Council telephoned the Commissioner on 21 October 2010. It stated that it had been contacting relevant individuals to ask for their consent to disclose the information. It added that unfortunately, not all of the individuals had responded. The Council stated that it would not be disclosing the names of any individual without consent or the names of those who were no longer employed by the authority as it felt that this was not fair. The Commissioner explained that consent was one of multiple factors to take into account when determining whether a disclosure would be fair. The Council expressed the view that only consent was relevant. The Commissioner pointed out to the Council that he had still not been provided with the withheld information (which had been asked for on 1 June 2010). The Council agreed to provide this when it sent its response to the Commissioner. The Commissioner and the Council agreed to a deadline and the Commissioner sent a letter to the Council dated 27 October 2010 confirming what information was required.
 16. The Council responded to the Commissioner on 29 October 2010. The Council confirmed to the Commissioner that it was seeking to withhold a number of names from the complainant. These comprised of the names of six councillors who had not consented to the disclosure and the names of three members of staff who are no longer employed by the Council. The Council also said that it was still waiting for one councillor to respond. The Council also provided the Commissioner with a copy of an email it had sent to the complainant dated 29 October 2010 in which it disclosed the relevant dates that it held and the names of other individuals who had been provided with a copy of the report. It specifically added, for reasons that were not made clear to the Commissioner, that it held no record of a report ever being passed to a particular MP.
 17. On 2 November 2010, the complainant wrote to the Commissioner confirming that he had received the Council's email described above. The complainant stated that he disagreed with the Council's position that the names represented personal data. He added that he wished the Commissioner to consider the Council's refusal to provide all of the names. The complainant also stated that during the litigation proceedings (which the Commissioner understands are currently ongoing between the Council and the complainant), a signed statement

- had been presented that stated that a particular MP did receive a copy of the report.
18. On 2 November 2010, the Commissioner wrote to the complainant clarifying that the Council was now only seeking to rely on section 40(2) in relation to the remaining withheld names. He also explained that in the Commissioner's view, the names would represent "personal data" for the purposes of the Data Protection Act 1998 ("the DPA").
 19. On 3 November 2010, the complainant wrote to the Commissioner again asking for clarification regarding the Commissioner's position in relation to what constitutes personal data.
 20. The Commissioner responded to the complainant on the same day.
 21. The complainant replied on the same day. He said that he did not accept the Commissioner's position that the names represented personal data. He also provided some general background information to help the Commissioner to understand the context of the request.
 22. On 3 November 2010, the Commissioner wrote to the Council. In relation to the names of the councillors that had been withheld because of a lack of consent and the names of three former council employees, the Commissioner explained that it was his view that this information should be disclosed. He invited the Council to consider the disclosure of this information. The Commissioner also asked some additional questions in order to satisfy himself that the Council had identified all the individuals to whom the report had been provided.
 23. Following a delay, the Council responded on 7 December 2010. In relation to the one councillor that had not responded at the time of the Council's response of 29 October 2010, the Council confirmed that this councillor had now consented and that the name had been forwarded to the complainant. The Council stated that it did not believe that it held any record showing that the MP referred to by the complainant had been provided with the report although it confirmed that it was undertaking searches. The Council's letter also suggested that the Council had not identified all of the names of those to whom the report was provided in its previous correspondence to the Commissioner.
 24. On 16 December 2010, the Commissioner wrote to the Council again. He asked for a copy of the Council's correspondence to the complainant in which it had disclosed the name of the councillor. He also pointed out that in the Council's letter it had referred to additional persons who had been provided with a copy of the report. These persons formed part of the Council's "Management Board" at the time and the Council

- had also referred to the involvement of the Head of Audit. The Commissioner asked the Council to disclose this information, together with the date that the report was provided to them, directly to the complainant unless it wished to claim that the information was exempt or that it was not held in a recorded form. The Commissioner also said that the complainant was clearly aware of the name of the solicitors to whom a copy of the report had been provided (mentioned in paragraph 14 of this notice) but it was not clear how he was aware of this or if he had been told the date when the information was provided to the solicitor. The Commissioner invited the Council's clarification. The Commissioner also asked the Council to confirm the outcome of its searches to check that it did not hold any records showing that a copy of the report was provided to the MP mentioned by the complainant.
25. On 24 December 2010, the Council responded to the Commissioner and supplied a copy of its email to the complainant dated 12 November 2010. It confirmed that it would also provide the complainant with the details of the Management Board that received the report, which included the name of a former council employee whose name had previously been withheld by the Council using section 40(2). The Council also stated that it was willing to disclose the name of another former council employee who had been provided with a copy of the report. This name had also previously been withheld using section 40(2). In relation to the solicitors firm that had been provided with the report and the date of that disclosure, the Council confirmed that the complainant had already been provided with this information although it did not clarify the circumstances. It confirmed that following searches, no record had been found showing that the MP referred to by the complainant had been provided with a copy of the report.
 26. On 11 January 2011, the Commissioner wrote to the Council to ask it to write to the complainant to disclose the two previously withheld names along with the date that the report was provided to those persons as well as the additional information relating to individuals on the Council's management board who had also been provided with a copy of the report.
 27. On 17 January 2011, the Commissioner sent a further email to the Council asking it to confirm that it had never held any recorded information showing that the particular named MP had been provided with a copy of the report.
 28. The Council responded to the Commissioner on 7 February 2011 and stated that it had never held information showing that the MP had been provided with a copy of the report. On 11 February 2011, the Commissioner also received a copy of the Council's email to the

complainant dated 7 February 2011 in which it disclosed the names of staff on the management board and the date when the report was provided to them.

29. The Commissioner noted that the Council's email to the complainant had not disclosed the name of the Head of Audit whose involvement had been referred to in the Council's letter of 7 December 2010. The Commissioner telephoned the Council on 15 February 2011 to discuss this. The Council agreed to disclose the name of the Head of Audit to the complainant who had seen a copy of the report at the meeting of the Management Board.

Analysis

Substantive procedural issues

Did the Council hold information showing that the information was provided to the MP named by the complainant?

30. The Council confirmed that it held no record to show that the information was made available to the MP. The complainant pointed out however that the Council had made a statement (it seems that this formed part of the ongoing legal proceedings between the complainant and the Council) which said that the MP had seen the report. The Council acknowledged that the MP had seen the report at a meeting but no record was kept of this.
31. The Commissioner asked the Council to explain what searches it had conducted in order to ascertain whether, on the balance of probabilities, it held a copy of this information. The Council explained that it had recently been dealing with a subject access request from the complainant and it extracted all the information it held dating back to 2003. The Council's in house legal team were asked to mark any record showing that the MP was provided with a copy of the report. Following this activity, the Council was able to confirm that no such record existed. It also confirmed that such a record had never been held.
32. On the balance of probabilities, the Commissioner was satisfied that the Council had never held a record showing that the report was provided to the MP.

Exemptions

Section 40(2) – third party personal data

33. This exception provides that any personal data that is not the personal data of the complainant will be excepted from public disclosure under the FOIA if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 (“the DPA”).
34. During his investigation, the Commissioner established that the Council was seeking to withhold the following information:
- The names of six councillors who refused to consent to the disclosure
 - The name of one former council employee

Is the withheld information personal data?

35. “Personal data” is defined in the DPA as information relating to a living individual who could be identified. The Commissioner is satisfied that the names of individuals would meet this definition.
36. The complainant did not accept that the information is personal data. He relied on the Court of Appeal’s analysis in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. The complainant argued that the information must be biographically significant and that the data subject must be the focus of the information. The Commissioner’s view is that the judgment refers to the notions of “focus” and “biographical significance” as two factors that may be of assistance in certain marginal cases like *Durant* where the information in question is not directly about the individual. The judgment makes clear that the determination of what is personal data is to be consistent with the understanding set out in Directive [95/46EC] that personal data is information relating to individuals who could be identified from the information. The Commissioner’s view is that names clearly relate to identifiable individuals and are therefore personal data.

Would disclosure contravene the first principle of the DPA?

37. The first principle of the DPA is most relevant in this case and provides that personal data should only be disclosed in fair and lawful circumstances.

Was it fair for the Council to disclose the information?

38. In considering whether a disclosure is fair under the first principle, the Commissioner considers that it is useful to balance the consequences of any disclosure and the reasonable expectations of the data subject, with principles of accountability and transparency.

Reasonable expectations

39. The Council maintained throughout the Commissioner's investigation that it would not be able to disclose the names of the councillors without their consent. The Council said that it had not asked the former employee to consent as he was no longer employed by the Council and this meant that the disclosure would automatically be unfair to him.
40. The Commissioner's position is that while knowing whether an individual objects to a disclosure can be useful in determining whether a disclosure would be fair, it is only one factor of many possible factors that are relevant in considering the issue of fairness. A lack of consent suggests that a disclosure was not within the expectations of an individual however, it is sometimes the case that even though an individual does not wish information to be disclosed, in the circumstances the disclosure ought to have been within their reasonable expectations. In this case, the Commissioner notes that councillors are elected officials with public-facing roles. He would therefore attach substantial weight to the need for councillors to be accountable and transparent about their activities. The Commissioner's view was that the disclosure should have been within the councillors' reasonable expectations.
41. In relation to the former council employee, the Commissioner's view is that the fact that an individual is no longer employed by a public authority does not in itself mean that the disclosure would be unfair. A request should be considered at the time it was submitted and the Council did not state whether the individual was still employed at the time of the request. Moreover, in relation to this name, the Commissioner considered that the individual, while not in a senior role, was in a public-facing role. The Commissioner considers that the nature of this role would have increased the individual's expectation that information about their role would be disclosed to the public. In this case, the Commissioner felt that disclosure ought to have been within the individual's reasonable expectations.

Consequences of disclosure

42. The Council was particularly concerned that the complainant would try to contact the individuals who received a copy of the report and that this would be unfair to them. The Council explained that there was a difficult background to the matter as set out in the background section to this notice. It felt that the background made it more likely that the complainant would try to contact the named individuals.

Balancing the rights and freedoms of the data subject with the legitimate interests of the public

43. The Commissioner carefully considered the above. He appreciates that it is possible that the complainant may wish to contact the individuals concerned however, it was not clear to the Commissioner why this could not be managed appropriately by those individuals. The Commissioner particularly felt that in the case of councillors, dealing with correspondence from members of the public is part of their role and is to be expected. Overall, the Commissioner was not persuaded that disclosure would be unfair.

If disclosure was fair, was it necessary?

44. The first Data Protection Principle states that personal data shall only be disclosed in circumstances where it is fair and lawful to do so and in particular where the disclosure would not contravene any of the conditions in schedule 2 of the DPA. Condition 6 is most relevant in this case and this cannot be satisfied unless the disclosure would also be necessary.
45. The Council argued that it was not necessary to name the individuals who received copy of the report and that it was sufficient to make general statements such as confirming that the report had been provided to any councillors asking for it.
46. The Commissioner appreciates that it will not be necessary in all cases to name individuals because other information that can be made available will satisfy the legitimate public interest. Nevertheless, the Commissioner felt that in this case, it is important that persons in public-facing roles are transparent about accessing reports concerning individual complaints. This is particularly so in the case of elected officials whose roles carry a very strong expectation of transparency in general.
47. In view of the above, the Commissioner considered that section 40(2) was not engaged.

Procedural Requirements

48. As the Commissioner considered that section 40(2) was not engaged, he finds that the Council breached section 1(1)(b) and 10(1) for its failure to disclose the information.
49. The Commissioner also notes that the Council breached section 17(1)(a)(b) and (c) because of its failure to issue a valid refusal notice within 20 working days or by the date of its internal review.

The Decision

50. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the FOIA because:
 - Section 40(2) was not engaged. The Council therefore breached section 1(1)(b) and 10(1) of the FOIA for failing to disclose the information within 20 working days or by the date of its internal review.
 - It failed to issue a valid refusal within 20 working days. This is a breach of section 17(1)(a)(b) and (c) of the FOIA.

Steps Required

51. The Commissioner requires the public authority to take the following steps to ensure compliance with the FOIA:
 - Disclose the withheld names of the councillors to whom the report was provided
 - Disclose the withheld name of the former council employee to whom the report was provided
52. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

53. 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

54. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Internal review

55. 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. 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 FOIA, 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. 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, it took more than 20 working days for the Council to conduct an internal review, despite the publication of his guidance on the matter. The Commissioner trusts that the Council will ensure that it conducts internal reviews in accordance with the Commissioner's guidance in the future.

Right of Appeal

56. 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 15th day of March 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

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.”

Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

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

Act.

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).”