

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 June 2011

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Summary

The complainant made a request for information from Sheffield City Council (the "Council") for the curriculum vitae ("CV") details, application for employment and references of a senior employee. He also requested other details surrounding the recruitment and selection of the same senior employee. The Council disclosed part of the requested information to the complainant but withheld the CV, application, reference details and the names of the selection panel that recruited the employee. During the course of the investigation the Council disclosed the names of the selection panel but continued to withhold the remaining requested information. The Commissioner considers that the Council correctly withheld the remaining information under section 40(2) and requires no other action to be taken. However, the Commissioner also finds that the Council breached section 10(1) in responding late 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 7 July 2010 the complainant made the following request for information to Sheffield City Council:

"Freedom of Information Request - Selection and Appointment of [named individual]"

Could you please send a copy of the c.v. and application and references of [named individual] prior to her being appointed to her current position within Sheffield City Council.

Had the council received any personal recommendations for [named individual] - if so, by whom, when, and, if in writing, please send these also.

How many other applicants were there?

Who were the Executives and Elected Members who were involved in the selection and final decision to appoint [named individual]? What was the date of the final meeting on this?

Was any outside agency or organisation involved with the offering of [named individual] as a candidate or her subsequent appointment? If so, please provide details, including costs."

3. On the same date, in acknowledging the reply, the Council said that it would release what was appropriate but that it did not consider that references were disclosable.
4. The complainant wrote back to the Council querying the comments it had made about references. The complainant maintained that when a senior person was appointed it was a matter of "probity" that references be disclosed.
5. On 11 August 2010 the Council provided the complainant with some of the requested information but issued a refusal notice for part of the information under section 40(2) and section 41. The information refused was:
- the names of the elected members on the selection panel; and
 - the CV, application form and references of the named individual.
6. On 13 August 2010 the complainant asked for an internal review to be carried out. He stressed that the age, address and marital status of the named employee could be redacted, however he could not see any

reason why details connected with the named employee's professional status could not be disclosed. Additionally he suggested that referees for high profile jobs would expect their names to be disclosed.

7. An internal review on 3 December 2010 upheld the original decision whilst supplying some additional information – the date of the final meeting regarding the appointment of the named individual - that had been omitted from the previous correspondence. This review said that details about the advertising costs for this post were no longer held. The review also suggested that the named employee would consent to certain disclosures such as their professional qualifications and relevant work history if the request was revised.
8. Another internal review letter was sent on 7 December 2010 which was slightly different than the previous one in that it did not contain a suggestion that the complainant revise his request.

The Investigation

Scope of the case

9. On 7 December 2010 the complainant copied the Commissioner into an email he sent to the Council which queried the way his request for information had been handled. The complainant did not specify what points he wished the Commissioner to consider. However, the Commissioner confirmed with the complainant that the scope of his investigation was the remaining withheld information:
 - A copy of the CV, application form and references of the named individual obtained prior to their employment.
 - The names of those who attended the selection committee.
10. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - On 19 April 2011 the Council disclosed the names of those who had sat on the selection committee that appointed the named individual.

Chronology

11. On 20 April 2011 the Commissioner wrote to the complainant to attempt an informal resolution of the complaint. He indicated in a preliminary view that he would not expect the CV, application form and references of the named individual to be disclosed.

12. However, the complainant wrote back to the Commissioner on the same day that he disagreed with this conclusion and requesting a Decision Notice.

Analysis

Substantive Procedural Matters

Exemptions

Section 40(2)

13. The full text of sections 40(2) and 40(3)(a) can be found in the Legal Annex at the end of this Notice.
14. The Council's position is that the CV, application form and references of the named individual contains third party personal data which makes them exempt from disclosure.
15. Section 40(2) provides that a request for information is exempt if it constitutes personal data of which the applicant is not the data subject and that the first or second condition of section 40(3) is satisfied. This means that disclosure would contravene any of the data protection principles or a section 10 notice under the Data Protection Act 1998 (the "DPA").
16. In line with the provisions of sections 40(2) and 40(3)(a), the Commissioner has gone on to consider whether the information is personal data as stipulated in the DPA. Section 1(1) of the DPA defines personal data 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 intentions of the data controller or any other person in respect of the individual;"*

17. The Commissioner considers that the requested information is personal data within the definition of the DPA for the following reasons:
 - Living individual/s can be identified from the data.
 - The data has the potential to impact on an individual, whether in a personal, family, or professional capacity.

- The CV, application form and reference data in each report has biographical significance and relates to a particular individual and provides information about that individual which does render them identifiable.
18. The Commissioner has gone on to consider whether disclosure of the information would contravene the first data protection principle.
 19. The first data protection principle says that personal data should be processed fairly and lawfully. The focus of any consideration of section 40 is on fairness. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has determined that the information relates to the professional or personal position of an individual and those prepared to provide references for the named individual as part of the recruitment process.

Seniority

20. The Information Commissioner's Office has produced Awareness Guidance on section 40 of the Act, which makes it clear that public authorities should take into account the seniority of employees when personal information about its staff is requested under the Act. The Commissioner takes the line that generally, the more senior the role within the public authority, the greater the weight in favour of disclosure will be.
21. The Commissioner's guidance "The Exemption for Personal Information" (version 3, 11 November 2008) on the application of section 40 suggests that, when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules it states that:

"Whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances) information about an individual's private life will deserve more protection than information about them acting in an official work capacity. You should consider the seniority of their position, and whether they have a public-facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (e.g. the official's family)."

22. The Commissioner confirms that in this case, although the named individual is now in a senior role at the Council, the expectations of privacy of a senior employee regarding their CV, application form and references are objectively reasonable and outweigh the arguments for disclosure based on an employee's professional life.
23. The Commissioner has considered the nature of the requested information itself and he has no reason to believe that disclosure of the information is within the named individual's expectations. Disclosure would bring about the risk of damage and intrusion to the data subject. Requests for information about senior officials have to be balanced with the rights and freedoms of the data subject.
24. Although the exemption contained in section 40(2), if found to be engaged, is absolute and therefore not subject to the public interest test, the Commissioner will still consider legitimate interests in favour of disclosure when conducting an investigation.
25. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure. This has been evident in cases for example involving MPs expenses (such as EA/2006/0015 & 0016) where on appeal the High Court stated:

"The expenditure of public money through the payment of MPs salaries and allowances is a matter of direct and reasonable interest to taxpayers."
26. However, in this instance the Commissioner does not accept that the legitimate interests of the public would be served by the disclosure of the CV, application form and references of the named individual. Given the mechanisms in place if job applications are found to be inaccurate or fraudulent, any benefit in terms of transparency would not outweigh the potential detriment to the individual involved.

The Reasonable Expectations of the Data Subjects

27. Fairness is the first thing the Commissioner looks at when considering the release of personal data. The Commissioner does not accept that it is within the reasonable expectations of the named individual that information in support of her application for a post, however senior, would be released.
28. In the circumstances of this case the Commissioner finds that disclosure would contravene the first data protection principle.

The Commissioner considers that the data subject had a reasonable expectation of privacy in relation to their CV, application form and references and to release the requested information would be unfair and be likely to cause distress to the data subject. He is therefore satisfied that the public authority was correct to refuse disclosure under section 40(2).

29. The Commissioner does not agree with the complainant's contention that, merely because some of the CV information has been disclosed by the named individual in the media, it would be within their reasonable expectations that their CV, application and references would be disclosed without their consent. The Commissioner has concluded that prospective candidates have an implicit expectation that the requested information will be held in confidence.
30. The Commissioner also considers that it would not be in the reasonable expectations of the data subjects in this matter – the named individual's referees – that their names or position as referees would be disclosed or the content of their references. It is normally accepted that an individual's references will not be disclosed. The reason is that it is considered a private matter between the individual and his or her referees, however high profile the position being applied for. Agreeing to be a referee is not the same as a nomination which is a public affirmation. The Commissioner agrees with the Council in its internal review that, whilst it is reasonable for referees to be held to account where it is discovered that information provided by them was done so negligently, it cannot be expected that an individual's CV, application form and references will be disclosed to third parties.

The Consequences of Disclosure

31. The Commissioner considers that one of the consequences of disclosure for the named individual might mean that their referees would not be prepared to write a reference for them again and their employment prospects could be materially affected. The Commissioner does not accept that because the named individual was, at that time, applying for a senior post they were any less entitled, after securing that appointment, to keeping their CV, application and references private than any other individual making a job application.
32. The Commissioner is satisfied that the requested information which relates to the categories defined above is personal data and that disclosure would breach the first data protection principle. For this reason he agrees with the Council that the section 40 exemption is engaged. As this is an absolute exemption it is not subject to the public interest test.

33. As the Commissioner is satisfied that section 40(2) is engaged in this matter he has not gone on consider section 41.

Procedural Requirements

34. Section 10(1) provides that-

'... 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.'

35. The original information request in this case was made on 7 July 2010. In failing to provide a response compliant with section 1(1), within 20 working days of receipt of the request, the public authority breached section 10(1).

The Decision

36. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It correctly withheld information in accordance with section 40(2).

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority did not comply with the requirement of section 10(1) in failing to provide confirmation or denial within 20 working days of receipt of the request.

Steps Required

37. The Commissioner requires no steps to be taken.

Right of Appeal

38. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

39. 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.
40. 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 21st day of June 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
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."

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."

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
- (a) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (b) 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

(i)
section 10 of that Act (right to prevent processing likely to cause damage or distress), and 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."