

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 July 2011

Public Authority: Brighton & Hove City Council
Address: King's House
Grand Avenue Hove
East Sussex
BN3 2LS

Summary

The complainant asked Brighton & Hove City Council (the "public authority") to provide information relating to the job evaluation of a particular post. The public authority withheld some of the information using the exemptions in section 22(1) (information intended for future publication) and 40(2) (personal information) of the Freedom of Information Act (the "Act").

The Commissioner's decision is that the exemption in section 22(1) is not engaged. Furthermore, section 40(2) is not engaged as the requested information does not constitute 'personal data' under the terms of the Data Protection Act 1998 (the "DPA"). He therefore finds that the public authority should release the requested information and he upholds the complaint.

The public authority's handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

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. The information request has been made by a Union Representative who is working on behalf of staff employed by the public authority.
3. The information sought concerns the Hay Evaluation score of a post and how this has been determined. Although sourced from a different public authority¹, the following is a clear introduction to the Hay Evaluation Scheme:

"What is job evaluation?"

Job evaluation is a means of establishing differentials by putting all jobs into a rank order.

What is the Hay scheme?

The Hay method of job evaluation has been around since the 1950s and has been designed so that one scheme could be applied fairly to all job types. It is the most widely used job evaluation scheme in the world and independent surveys show that it is the leading method of job evaluation in the UK. Over 100 local authorities use this method of job evaluation, over 30 of whom have used the scheme for all roles as part of Single Status implementation....

How is the job evaluated?

The Hay scheme evaluates each job using common elements, each element being measured on a separate matrix guide chart:

<i>KNOW HOW</i>	<i>The knowledge, skills and experience required for fully acceptable job performance</i>
<i>PROBLEM SOLVING</i>	<i>The span, complexity and level of analytical, evaluative and innovative thought required in the job. This is expressed as a percentage related to the KH score</i>
<i>ACCOUNTABILITY</i>	<i>The discretion given to the job holder either to direct resources of all kinds or to influence or determine the course of events, his/her answerability for the consequences of decisions and actions and any financial responsibility or impact</i>

¹ http://www.derbyshire.gov.uk/images/Hay%20JE%20Explained_tcm9-113273.pdf

ADDITIONAL WORK ELEMENTS *This assesses the physical demand and working conditions in which the job is carried out*

The Hay scheme is a factor comparison system which provides the facility for checking the soundness of an evaluation by completing a range of checks and balances including the technical consistency of the evaluation, comparison of the weight of a job element versus the same element in another council job, and considering the shape or profile of the job. This is accomplished by testing the distribution of the three elements of know how, problem solving and accountability, in the evaluation of each job to see if it makes sense.

Broad rules that must be applied when using the Hay methodology:

- *It is the job that is evaluated not the person*
- *The evaluation is based on a fully acceptable level of performance*
- *Present grade, pay and status is not relevant*
- *Jobs can only be evaluated if they are adequately described and understood*

Jobs which have the same job title or job description may not necessarily result in the same assessment. The evaluation includes consideration of the organisation structure and operating context of the job”.

The request

4. On 11 August 2010 the complainant made the following information request:

"This is a formal request for information under the Freedom of Information Act 2000. The [Unions] working on behalf of the Investigations Officers in Brighton & Hove City Council request the following information in regards to the Single Status grading of their post.

- *We would like to know the scoring of the HAY job evaluation of the Investigations Officers JIN 2070 in regards specifically to the knowhow score, problem solving and accountability. We*

also want to know the HAY scoring of the comparators post JIN 2063 of the Housing Options Officer.

- Can you confirm where in the policy does it state we can only use one comparator and can you please supply documents to support the decision?*
- Please provide the relevant job evaluation sheets which record the council's analysis and conclusion for both the Investigations Officers Jin 2070 and the Housing Options post Jin 2063.*
- Please provide copies of the notes taken by [name removed] and the Fraud Manager [name removed] in the stage 1 appeal process that formed the decision of the stage 1 appeal.*
- Please provide copies of all documentation used in connection with the decision making process at the stage 1 appeal and at the time the original grade of 6 was allocated to the post of Investigations Officer as notified in January 2010 prior to the appeal at stage 1.*
- Can you clarify the definitions of the words "Comparison" and "Comparator" in the way the council interpret it inline with single status?*
- We would like to know the exact reason for not upholding the stage 1 appeal, given that in the appeal the appellants gave a comprehensive comparison to the work of the comparator.*
- We would like all copies of any correspondence in regards to this case."*

5. On 20 September 2010, outside the statutory time for compliance, the public authority sent its response. It withheld the information under the exemption in section 40(2) of the Act (personal information). It also stated:

"It is also considered that disclosure is not required to be made pursuant to section 22 of the Act [information intended for future publication] of the Act. We are part way through implementation of our new pay and grading structure and some individuals have still to receive formal notification of their new grade whilst others have completed the appeals process.

We operate all our evaluation panels in partnership with the trade unions and at the panels they have full access to the detailed scores of all posts. Our appeal process is designed around evaluating an agreed job description for a post. General information about Hay factors is made available to staff on our intranet but the nature of the appeal process is to determine what role the individual carries out. We would be very concerned about changing our process part way through. When the process is complete we intend to undertake a detailed equality impact

assessment and then following that we will provide individuals with the details of the evaluation line of their post if they wish. It is the council's decision as an employer as to where it sets its payline. Considering the nature of the information the Council do not consider that it is reasonable to disclose now or that the public interest criteria met [sic]".

6. On 27 September 2010 the complainant sought an internal review.
7. On 26 October 2010 the public authority responded. It provided some information but withheld the remainder citing the exemption in section 40(2) of the Act.

The investigation

Scope of the case

8. On 17 November 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - delays in responding
 - the withholding of information under section 40(2)
9. The complainant also stated:

"... we are only after the HAY score of [a Housing Options Officer], we are not after information that will identify individuals.

We do not believe it is personal data as the data is held in regards to a job title..."
10. The Commissioner subsequently clarified with the complainant that the information she still required was:
 - the Hay scoring of the comparator's post JIN 2063 of the Housing Options Officer ("HOO");
 - the relevant job evaluation sheets which record the council's analysis and conclusion for both the Investigations Officer post and the HOO post;
 - copies of *"any correspondence in regards to this case"*.

11. The complainant also raised other issues about the Hay Appeal Policy and Process. These issues are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

12. On 14 February 2011 the Commissioner wrote to the complainant to advise her he was commencing his investigation. He clarified the scope of his investigation in a telephone call.
13. On 17 February 2011 the Commissioner raised queries with the public authority. He chased a response on 17 March 2011 and again on 21 March 2011.
14. On 28 March 2011 the public authority provided a response.
15. On 30 March 2011 the Commissioner spoke to the complainant regarding the names of panel members which formed part of the withheld information. She confirmed that she did not require these and was happy for them to be removed from the scope of her complaint.

Analysis

Substantive procedural matters

Section 1 – general right of access

16. The complainant has queried whether or not the public authority has provided her with all of the information in respect of the final bullet point of her request, i.e. "*any correspondence...*". The public authority has advised that this has already been provided.
17. Section 1(1) of the Act states:

"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."*
18. The test which the Commissioner applies in determining whether a public authority holds any requested information is the balance of

probabilities. This is in line with the approach taken by the Information Tribunal in the case of *Bromley & others v the Environment Agency* (EA/2006/0072), in which it stated:

"...we must consider whether the IC's decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities..." (paragraph 10);

because

"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records" (paragraph 13).

19. In deciding where the balance lies in cases such as this one the Commissioner will look at both:

- the scope, quality, thoroughness and results of the searches; and
- other explanations offered as to why the information is not held.

The nature of the searches / other explanations offered

20. It is unclear what other correspondence the complainant believes may exist. Therefore the Commissioner asked the public authority to confirm whether it has considered the existence of any correspondence further to that already provided and what searches it had made in ascertaining this.

21. The public authority advised the Commissioner:

"... the only correspondence is that between the Investigation Officers, their line manager, union representative and human resources re. setting up panel dates and communicating outcomes. We have satisfied ourselves by checking with the relevant HR officers that there is no other correspondence".

Conclusion

22. In reaching a decision in this case the Commissioner has considered the information he would expect the public authority to hold and whether there is any requirement for it to do so.

23. As the information relates to HR matters the Commissioner would expect the HR section to be the appropriate place for any searches to

be conducted for correspondence and he is advised that this is what has been undertaken.

24. The complainant has not provided any evidence or reason to suggest the existence of further information in respect of this part of her request. Although such an onus is not normally placed on the requestor, in this case the Commissioner considers it likely that she would be in a position to know if further correspondence may exist as she is an interested party.
25. The Commissioner has concluded that there is no evidence that would justify refusing to accept the public authority's response that it does not hold any further correspondence. Having considered what information it does hold, the Commissioner therefore concludes that, on the balance of probabilities, the public authority does not hold anything further.

Section 22 – information intended for future publication

26. The public authority has argued that all of the information falling within the scope of this request is exempt from disclosure by virtue of section 22(1)(a) and (c).
27. Section 22(1) provides that:

"Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),...

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

28. In order to determine whether section 22 is engaged the Commissioner therefore needs to consider the following questions.
 - Is the information requested actually held by the public authority?
 - When the request was submitted, did the public authority have an intention to publish the information at some date in the future?
 - If so, was this date determined when the request was submitted?
 - In all the circumstances of the case, is it 'reasonable' that information should be withheld from disclosure until some future date (whether determined or not)?

Is the information requested actually held?

29. The Commissioner has been provided with a copy of the requested information so its existence is not in doubt.

When the request was submitted, was there an intention to publish the information at some date in the future?

30. When it issued its original refusal notice the public authority indicated that it wished to cite this exemption as well as section 40(2) because it was part way through implementation of its new pay and grading structure.
31. At internal review stage no mention was made of section 22. It was only during the Commissioner's investigation that this was reintroduced. The public authority indicated that any disclosure would be subject to its completing its single status review but that it did not know when this would be done.
32. At refusal stage the public authority stated:

"We operate all our evaluation panels in partnership with the trade unions and at the panels they have full access to the detailed scores of all posts. Our appeal process is designed around evaluating an agreed job description for a post. General information about Hay factors is made available to staff on our intranet but the nature of the appeal process is to determine what role the individual carries out. We would be very concerned about changing our process part way through. When the process is complete we intend to undertake a detailed equality impact assessment and then following that we will provide individuals with the details of the evaluation line of their post if they wish. It is the council's decision as an employer as to where it sets its payline. Considering the nature of the information the Council do not consider that it is reasonable to disclose now or that the public interest criteria met".

33. The Commissioner sought further clarification regarding the future disclosure of the information and was advised:
- "We anticipate the review will be completed by end of August. We will then publish to individuals details of their evaluation line if requested. If individuals would like information about colleagues evaluation lines it will be necessary to obtain their written consent".*

34. In order to engage this exemption a public authority must be able to show clearly which information within the scope of a request it intends to publish. It is not sufficient to say that it will identify for publication some, but not all, information within the scope of the request. Furthermore, the disclosure must be intended rather than based on the requirement for individuals to give consent.
35. The Commissioner does not consider that the public authority's response represents a clear intention to publish in the future. Not only is the timescale tenuous, but the intention is at some unforeseen time to conduct a further assessment to ascertain whether or not disclosure can be made. The extent of any future disclosure therefore remains very unclear and is not a foregone conclusion.

Was the date of publication determined when the request was submitted?

36. As identified above, no actual future date has been either provided or suggested.

In all the circumstances of the case, is it 'reasonable' that information should be withheld from disclosure until the date determined?

37. In deciding whether it is reasonable in this case to withhold the information until the date of intended publication the Commissioner has considered his published guidance on the exemption: *Freedom of Information Act Awareness Guidance No 7 – Information Intended for Future Publication*.
38. This guidance notes that in assessing reasonableness, "*generally, the sooner the intended date of publication, the better the case for maintaining the exemption*".
39. In this case the public authority has argued that it was reasonable to withhold the requested information as it was part way through implementation of a new pay and grading structure. This was the situation at the time of the request, i.e. 11 August 2010, and appears to remain the case as indicated in the latest correspondence it sent to the Commissioner on 28 March 2011 more than seven months later. Although the Commissioner understands that the public authority is undertaking what appears to be a lengthy task this does not exclude it from its duty to comply with the Act.
40. The Commissioner notes that the complainant, in her capacity as a trade union representative, is representing some of the post holders who stand to be affected by the structural changes. She is attempting to gather the information to assist the staff with their claim that the

post evaluation is not fair. Some seven months later this information has still not been made available to the parties affected, even outside the Act, although comparable information about another post has been released. The public authority is still unable to estimate a date of intended publication and it is still unclear whether the remaining information will be fully disclosed at this future point. It is also likely that this release date will mean that the information is of limited value to the parties concerned because, at this point, the actual restructure is likely to be deemed a completed process.

41. On the basis of his findings above the Commissioner is satisfied that section 22(1) is not engaged. It is not therefore necessary for him to consider the public interest in disclosure.

Exemptions

Section 40(2) – personal information

42. The complainant has already confirmed that she does not require the names of any panel members within the withheld information. The Commissioner will therefore not consider these.

43. 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".*

44. The exemption provided by section 40(2) is an absolute exemption in combination with section 40(3)(a)(i) or 40(3)(b). This is where disclosure of information which falls under the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (DPA) would breach any of the data protection principles.
45. In order to decide whether or not this exemption is engaged, the Commissioner shall consider whether the requested information is the personal data of one or more third parties and whether the release of this information would be fair and lawful.

Is the information personal data?

46. Section 1(1) of the Data Protection Act 1998 (the DPA) provides the following definition of personal data:

"personal data' means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."

47. This provides two criteria that must be fulfilled for information to constitute personal data; the information must relate to an individual, and that individual must be identifiable either from that information directly, or from that information combined with other information available to the holder of that information.
48. The undisclosed information consists of three forms relating to the job evaluation of an HOO post; the Commissioner has been advised by the public authority that there are 22 such post holders.

Housing Options Officers

49. Having viewed the withheld information, the Commissioner considers it clear that the information requested relates to a post title which is filled by several staff. It does not refer to any individual and no individual's name is attributed to the post within the withheld information. Accordingly, he does not consider that any staff can be identified from the withheld information, other than the panel members, and consequently that it is not their 'personal data'.
50. As he concludes that the withheld information is not personal data the Commissioner finds that this exemption is not engaged.

Procedural requirements

Section 1(1) – General right of access

Section 10(1) - Time for compliance

51. 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."

52. 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."

53. The Commissioner finds that the public authority breached section 10(1) by failing to inform the complainant whether or not it held the requested information within 20 working days of the request.

54. Furthermore, as the Commissioner has decided that the withheld information is not exempt from disclosure he finds that the public authority breached sections 1(1)(b) and 10(1).

Section 17(1) - Refusal of request

55. Section 17(1) of the Act 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."*

56. In failing to provide a valid refusal notice within the statutory time limit, the Constabulary breached section 17(1).

The Decision

57. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

- In failing to comply with the request within the statutory time limit it breached sections 10(1) and 17(1).
- In failing to provide information that the Commissioner has concluded should have been released it breached sections (1)(b) and 10(1).

- It incorrectly withheld the requested information by reference to sections 22(1) and 40(2), which the Commissioner now requires it to disclose.

Steps required

58. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- it should disclose the requested information.
59. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

60. 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

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

Internal review

62. 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*', 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. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

63. The Commissioner does not consider this case to be 'exceptional', so is concerned that it took over 20 working days for an internal review to be completed.

Right of Appeal

64. 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

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 7th day of July 2011

Signed

**Jon Manners
Group Manager**

**Information Commissioner's Office
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