

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 October 2011

Public Authority: Isle of Anglesey County Council
Address: Council Offices
Llangefni
Anglesey
LL77 7TW

Summary

The complainant wrote to the Council and requested various pieces of information. A "peer review" in respect of a named official was withheld by the Council by virtue of section 40(2) of the Act. The Commissioner has investigated and finds that the Council correctly applied the exemption at section 40(2) to the withheld information. The Commissioner has identified a number of procedural shortcomings in the way the Council handled the complainant's 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 22 September 2010 the complainant wrote to the Council and made the following request for information (numbering added for clarity):

“[Interim Managing Director]’s Remuneration Package

- 1) *could I have a copy of his contract and/or the contract with [named company]*
- 2) *how much is [named company] being paid for his services for his second year at Anglesey?*
- 3) *are there any bonuses involved?*
- 4) *if so, how much was this sum for last year?*
- 5) *was [interim managing director] given a relocation package of any kind?*
- 6) *if so what was the monetary value?*
- 7) *does he have an additional entitlement for accommodation?*
- 8) *if so, how much is it?*
- 9) *how much annual leave is he entitled to?*
- 10) *what are the terms of the [interim managing director]’s pension arrangements or are these rolled into the overall remuneration package?*
- 11) *if they are separate, how much did he receive last year?*
- 12) *does [interim managing director] have a car allowance or is he supplied with a council vehicle?*
- 13) *if he is granted a car allowance, how much is this?*
- 14) *what mileage expenses is he allowed and how much did he claim last year?*

Anglesey Recovery Board

- 15) *can you tell me how much the ARB has cost so far?*
- 16) *how much do the chair and members receive by way of remuneration?*

Complaint against [Council official]

- 17) *how much were the solicitors who helped to prepare the complaint to the Ombudsman paid?*

Investigation into [named official]

18) *can you tell me the name of the person who carried out this investigation?*

19) *what was the cost of this exercise?*

20) *can I have a copy of his/her report?*

Senior officials' pay

21) *could you supply me with a list giving the names of the main heads of department and their total salary for the last available year?*

PriceWaterhouseCooper

22) *can you tell how much the council have paid PWC in each of the last three years for which data is available?*

23) *please break down the figures into audit and non-audit work."*

3. The Council responded to the request on 26 October 2010. The Council provided full responses to some parts of the request. The Council withheld parts of the request relating to the interim managing director by virtue of section 40(2) and 43(2) of the Act, and explained that other information was not held by the Council. The Council explained that some of the information relating to Anglesey Recovery Board was not held by the Council. The Council refused to comply with the elements of the request relating to PriceWaterhouseCoopers on the basis of the exemption at section 21 of the Act, since this information was available by other means. The Council provided the complainant with a direct link to access this information.
4. The complainant wrote to the Council on 5 November 2010 to request an internal review of its handling of his request. The complainant was unhappy that the Council's response had been issued outside of the 20 working day deadline for response. The complainant also queried the "restrictive" way that his questions had been answered, and the Council's reliance on the exemptions under the Act.
5. The Council provided the outcome of its internal review on 8 December 2010, upholding the conclusions set out in its initial response of 26 October 2010.

The Investigation

Scope of the case

6. On 16 December 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 applied the exemptions under the Act to the withheld information and to consider any procedural issues relating to the Council's handling of his request.
7. The complainant also asked the Commissioner to consider the Council's interpretation of one element of his request. Where the complainant had requested information relating to an "investigation into [named official]" (parts 18-20 of his request), the Council had interpreted this as a request relating to an "investigation into planning matters". The complainant asked the Commissioner to consider whether the Council had correctly interpreted this part of his request.
8. During the course of the Commissioner's investigation, the Council decided to disclose all information relating to the interim managing director. The Council confirmed that as the interim managing director's employment with the Council would be ceasing soon, that the public interest in this information now favoured disclosure.
9. Further to the disclosure of information set out at paragraph 8 above, and further to the dispute over the interpretation of parts 18-20 of the request, the remaining withheld information relevant to the request was agreed with the complainant on 27 June 2011 to consist of a "peer review" into a named official. The scope of the Commissioner's investigation was therefore to investigate the Council's application of the exemption at section 40(2) of the Act to the "peer review" into the named official.

Chronology

10. The Commissioner wrote to the Council on 3 March 2011 and requested copies of any information that had been withheld and further arguments to support the Council's application of the exemptions at section 40(2) and 43(2) of the Act to the requested information.
11. The Council responded on 7 April 2011 and confirmed its intention to disclose information relating to the interim managing director due to a change in circumstances. The Council also confirmed its view that it had misinterpreted parts 18-20 of the request, which related to the investigation into a named official. The Council confirmed that it held

information falling within the scope of this part of the request, but also confirmed that the information was exempt from disclosure by virtue of section 40(2) of the Act.

12. The Commissioner wrote to the Council on 10 May 2011 and requested detailed arguments to support its application of the exemption at section 40(2) of the Act to the requested peer review report.
13. The Council responded on 10 June 2011 and provided arguments in support of its application of section 40(2) of the Act to the withheld peer review document.

Analysis

Interpretation of request

14. In this case it is necessary to first consider the Council's interpretation of one element of the request to determine whether it has complied with the Act. In particular the Commissioner must consider whether parts 18-20 of the request, when read objectively, related to an "investigation into planning matters", in line with the Council's initial response of 26 October 2010.
15. In parts 18-20 of his initial information request, the complainant asked three questions with reference to an "investigation into [named official]". The Council initially interpreted this to mean an "investigation into planning matters", and provided the complainant with a full response (in the context of the investigation into planning matters) to question 19, and confirmed that information falling within the scope of questions 18 and 20 was exempt from disclosure by virtue of sections 40(2), 41 and 30(2) of the Act and regulation 12(5)(d) of the EIR.
16. During the course of the Commissioner's investigation, the Council identified that it had incorrectly interpreted the complainant's request in relation to the "investigation into [named official]". The Council confirmed to the Commissioner on 7 April 2011 that it had reviewed its interpretation of the request and had identified one piece of information falling within the scope of the correctly interpreted request. The information identified as falling within the scope of the request was a "peer review" into the named official, rather than an external investigation.
17. Having considered the wording of the request, the Commissioner considers that the complainant's interpretation of this part of the request is an objective reading of the request, and that the Council

incorrectly interpreted it as a request for an investigation into planning matters.

Exemptions

Section 40(2)

18. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 ('the DPA').

Is the information personal data?

19. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as:

"...data which relate to a living individual who can be identified

1) from those data, or

2) 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".

20. The withheld information in this case consists of a peer review document in respect of a particular, named official. The report in question relates to an investigation as a result of allegations made against the named official.

21. Therefore, the Commissioner considers that the withheld information in question does relate to a living individual who could be identified from it. The Commissioner is therefore satisfied that the information in question falls within the definition of personal data as set out in the DPA.

The first data protection principle

22. Having concluded that the information falls within the definition of "personal data" the Commissioner has gone on to consider if disclosure of the information would breach the requirements of the first data protection principle. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (1) *at least one of the conditions in Schedule 2 is met, and*
- (2) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met"*

Fairness

23. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

a) Expectations of the individual concerned

24. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example, privacy. It is accepted that every individual has the right to some degree of privacy and this right is so important that it is enshrined in Article 8 of the European Convention on Human Rights.
25. However, expectations are also shaped by a society where transparency and the Freedom of Information Act's presumption in favour of disclosure of information form part of its culture. This was recognised by the Tribunal in the case of *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016) where it was said that:

"...The existence of the FOIA [Freedom of Information Act] in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money". (para 43)

26. The Commissioner's Awareness Guidance on 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:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone

acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned".

27. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (ie their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (ie their public life).
28. The Commissioner notes that the information in question clearly relates to the named official's professional life, and consists of information about that individual acting in their official capacity.
29. The Council explained that the peer review in question could be considered as constituting an element of the named official's appraisal. The peer review was commissioned as a result of allegations made against the named official, which were found, following investigation, to be unfounded. The peer review document forms a part of the named official's HR file.
30. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. In his guidance on the section 40 exemption, the Commissioner suggests *'if the information requested consists of names of officials, their grades, jobs or functions or decisions made in their official capacities, then disclosure would normally be made'*. However, the Commissioner also considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information relates to an employee's professional life, and not their personal life.
31. Notwithstanding the fact that the information in question relates to the named official's public life, the Commissioner considers that the information relevant to this case could be argued to fall into the category of "HR information" and his general view is that this type of information should remain private.
32. Although the individual in question was employed at a senior level in the organisation, the Commissioner is satisfied that they would have had a reasonable expectation that confidential information relating to their appraisal and performance in their role would be kept confidential and not passed on to third parties without the explicit consent of the official in question. In this specific case, the Commissioner considers that the fact that the review was commissioned as a result of unsubstantiated allegations against the individual in question means that there would be even less expectation on the part of the named official that the resulting report would be made public.

33. In addition, whilst the Council has explained that the named official took part in the peer review entirely cooperatively, they were provided with assurances of strict confidentiality from the outset.
34. The Commissioner recognises that even amongst senior members of staff there would still be an expectation of privacy between the employee and employer regarding information about the employee's employment.

b) Consequences of disclosure

35. In assessing the consequences of disclosure the Commissioner has considered what those consequences might be and has then looked at other related factors. The Commissioner has taken into account that the data subject's emotional wellbeing may be affected by disclosure even though the distress or damage caused may be difficult to quantify.
36. The Commissioner considers that it is important to reiterate that this review was commissioned to establish the professional competence of the named official, as a result of allegations against them which were found to be unfounded. The Commissioner considers that further dissemination relating to the unfounded allegations against this individual could impact on them in their professional capacity. The Council also argued that the report could be used to inform or influence actions affecting the named official.
37. The Commissioner has considered the submissions made by the Council and the nature of the withheld information and he is satisfied that disclosure of the information to the public and the associated loss of privacy have the potential to cause unnecessary and unjustified harm to the individual in this case.

c) General principles of accountability and transparency

38. Notwithstanding the data subjects reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. For example, in the case involving the MP's expenses the former Information Tribunal commented that:

'79. ...in relation to the general principle application of fairness under the first data protection principle, we find:

(..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'.

39. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
40. The Commissioner accepts that any accusation of maladministration or failure to correctly follow procedures in a public authority would fall firmly within the public interest. However, the Commissioner considers that it is imperative to bear in mind that the allegations in this case were found to be unfounded, following full investigation. The Commissioner considers that this outcome means that the public interest in this report is limited, as it merely leads to a firm conclusion that any allegation was unfounded.
41. Therefore, in balancing the reasonable expectations of the data subject and the consequences of disclosure of the information against the legitimate public interest in disclosure, whilst the Commissioner accepts that there is a legitimate interest in disclosure (and would have been more so had the allegations been found to be true) he considers it to be outweighed by the reasonable expectations of the data subject and the potential consequences of disclosure. The Commissioner has therefore determined that it would not be fair to disclose the requested information. In his view, disclosure would breach the first data protection principle. He therefore upholds the Council's application of the exemption at section 40(2).

Procedural requirements

Section 1 and section 17

42. The request relating to the named official from the complainant stated:

"Investigation into [named official]"

- 1) *can you tell me the name of the person who carried out this investigation?*
- 2) *what was the cost of this exercise?*
- 3) *can I have a copy of his/her report?"*

43. The Council's response to this part of the request was that:

"the Council does not hold information about an investigation into [named official]. However you may be referring to an investigation into Planning matters recently concluded by an external independent authority".

44. During the course of the Commissioner's investigation, the Council identified that it had misinterpreted the request, and the Council subsequently identified that the information held falling within the scope of the request related to a "peer review" into the named official.
45. The Commissioner considers that the complainant's interpretation of this part of the request is an objective reading of the request, and that the Council incorrectly interpreted it as a request for an investigation into planning matters. Therefore the Commissioner considers that the Council breached section 1(1)(a) of the Act by failing to inform the complainant whether information falling within the scope of this part of the request was held by the Council.
46. By failing to provide the complainant with a refusal notice in respect of this part of his request, the Commissioner considers that the Council breached section 17(1) of the Act by failing to specify the exemptions on which it was relying in withholding this information, and failing to explain why, in its view, the exemption was engaged.

Section 10

47. Section 1(1) of the Act states 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*

48. Section 10(1) of the Act states 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.

49. The complainant made his request for information on 22 September 2010 and the Council responded formally on 26 October 2010. By failing to respond within 20 working days of the request the Council breached section 10(1).

The Decision

50. 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:

- 1) The Council was entitled to rely on the exemption at section 40(2) of the Act in withholding the peer review document

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

- 1) The Council breached section 1(1)(a) by failing to inform the complainant whether information was held falling within the scope of one element of his request
- 2) The Council breached section 17(1) by failing to issue a valid refusal notice in respect of one element of the complainant's request
- 3) The Council breached section 10(1) by failing to respond to the complainant's request within 20 working days

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

54. 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.
55. 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 27th day of October 2011

Signed

**Anne Jones
Assistant Commissioner
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."

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."

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.”