

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 23 April 2007

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DH

Summary

The complainant requested a copy of a report into the Norwich Central Library fire of 1994. The public authority withheld some parts of the report under both sections 36 and 40 of the Act and other parts under section 36 only. Following the Commissioner's intervention, the public authority released the information withheld under section 36 only. The Commissioner found that the public authority was correct to withhold the remaining information under section 40 of the Act and did not therefore consider the application of section 36 in relation to that information.

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 5 January 2005, the complainant requested the following information:

"a copy of the report into the Norwich central library fire of 1994 by the former [at the time of writing the report] CEO of Lincolnshire county council, Dudley Proctor, submitted to the council in July 1995."
3. Norfolk County Council (the Council) responded on 31 January 2005 by providing a copy of the report with some parts redacted. The Council applied the exemptions under section 36 (effective conduct of public affairs), section 40 (personal information) and section 41 (information provided in confidence) of the Act to withhold the information it had redacted.

4. On 10 February 2005, the complainant asked the Council for clarification of the decision to withhold the information, to which the Council responded on 9 March 2005.
5. On 9 May 2005, the complainant asked the Council to review its decision, to which the Council responded on 17 June 2005. In this response, the Council released more information to the complainant, but still wished to withhold some information under section 36 and section 40 of the Act. It did not refer to any application of section 41.

The Investigation

Scope of the case

6. On 31 August 2005 the complainant contacted the Commissioner to complain about the way his/her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The central library fire report should show further invoices from electrical contractors used in support of the report
 - The Council has incorrectly withheld information under sections 36 and 40 of the Act

Chronology

13 October 2006

7. The Commissioner wrote to the Council on 13 October 2006 asking it for the following:
 - a copy of the central library fire report (the report) without the redactions.
 - a response to the complaint about further invoices from electrical contractors
 - confirmation whether the Council wished to rely on section 41 of the Act
 - the Council's reasoning for applying section 40 of the Act, the Commissioner having taken the view to investigate the section 40 elements of the withheld information first, in the circumstances of this case.

23 October 2006

8. The Council responded on 23 October 2006:
 - providing a copy of the report without the redactions,

- stating that it could not confirm whether the report should show further electrical invoices due to the report being produced more than 10 years ago and having no background documents on this matter
- confirming that it did not wish to rely on section 41 of the Act

29 November 2006

9. On 29 November 2006 the Council provided an explanation for its application of section 40 to the withheld information in response to the Commissioner's correspondence of 13 October 2006.

14 December 2006

10. The Commissioner wrote to the Council again on 14 December 2006 for further information to assist his understanding of the Council's application of section 40. The Council responded on 15 January 2007.
11. The arguments put forward by the Council in relation to section 40 and the analysis of them are discussed in detail at paragraphs 20 to 27 below.

22 January 2007

12. The Commissioner wrote to the Council asking it to confirm whether it had considered contacting the individuals who would be affected by release of the withheld information to find out whether they would give their consent to release.

29 January 2007

13. The Council responded by stating that it would be impractical to contact individuals for consent because most had retired or left the authority, which would make contact difficult. The Council also stated that it would be unreasonable to contact the individuals given the very real concerns, fears and anxieties that were expressed at the time. The Council's view was that there would be no reason to assume that these concerns would have significantly diminished over time. The Council was also of the view that it would be difficult to provide the individuals affected by release with adequate support as most are no longer with the Council.

6 February 2007

14. The Commissioner wrote to the Council on 6 February 2007 informing it that he considered the Council was correct to withhold the information under section 40, which formed the vast majority of the withheld information. The Commissioner asked the Council to therefore consider releasing the relatively small amount of information which it was withholding under section 36(2)(b) and (c) only. The Council released that information to the complainant on 20 March 2007.

Analysis

Procedural matters

Invoices from electrical contractors

15. Appendix 2 of the report provides a list of the documents used by the writer of the report in support. At point 16, the following documents are listed: "Trivia Invoices from Fishers' Electrical Contractors for NCL [Norwich Central Library] from 31st December, 1991 to 31st May, 1994." Appendix 3 of the report then provides a brief description of the work carried out by Fishers' Electrical Contractors in relation to each invoice. In Appendix 3, there is a description of work carried out in relation to an invoice dated 30 June 1994. The fact that the date of this invoice comes outside the date range of invoices listed in Appendix 2 has led to the complainant's belief that there are further invoices seen by the writer of the report.
16. The Commissioner asked the Council whether the writer considered the invoice dated 30 June 1994 in preparing the report. The Council responded by stating that it was unable to confirm that this invoice was considered by the writer. The Council added that the report was produced 11 years ago and the Council has no background documents to confirm or deny whether the invoice was considered.
17. The Commissioner is limited to consider whether the complainant's request was handled in accordance with the Act. In this instance, he must decide whether there is any further information to be provided to the complainant in response to his request for the report. From the report, it is impossible to say whether or not the writer had sight of the invoice dated 30 June 1994. The Council has not been able to provide any information to confirm or deny this. As such, there is no evidence to suggest to the Commissioner that there is a copy of the report showing that additional electrical invoices were considered.
18. The Commissioner has had sight of the complete, unredacted report held by the Council. He is satisfied that the complainant has been provided with a complete copy of this, albeit with parts redacted due to information the Council has withheld under exemptions in the Act. It is apparent that the complainant may be questioning the accuracy of information contained in the report, but this is not a matter which the Commissioner is able to comment on.

Withheld information

19. Paragraph 13 above shows that, following the Commissioner's intervention, the Council released the information previously withheld under section 36 only. In relation to the remaining information withheld under both sections 36 and 40, the Commissioner focussed initially on the application of section 40.

Section 40 (personal information)

20. The Commissioner considers the information withheld under section 40(2) to be personal data, because it relates to living individuals (staff employed by the Council at the time the report was written) who can be identified from those data.¹
21. The Commissioner asked the Council for an explanation of its consideration of section 40(2). The Council put forward the argument that it would be both unfair and unlawful to release the withheld information as it deals with possible disciplinary action against employees of the Council.
22. The Council stated that the Commissioner had adopted this approach in a number of similar cases and gave as an example the case of 'The Governing Body of Boston Grammar School' under reference FS50068004. It added that some employees who were the subject of investigation underwent considerable stress during the course of the inquiry and its aftermath and, since most of the staff have since left the employment of the Council, they would not be afforded the necessary assistance and support normally available to employees if this information was released. The Council did not explicitly state whether this was an argument supporting either 'unfairness' or 'unlawfulness.'
23. In further support of its argument to withhold the information, the Council drew the Commissioner's attention to the review response of 17 June 2005. This response put forward the following points as to why the Council believed the disclosure of the information would specifically be unfair and therefore breach the First Data Protection Principle:
 - Employees would have been informed at the time that the report was confidential
 - Employees would therefore have expected that the information would not be disclosed and engaged in the Procter report and the managerial reviews after completion of the report on this basis.
24. In specific support that release of the information would be unlawful, the Council stated that it would result in a breach of confidentiality of staff.
25. The Commissioner asked the Council for details of any disciplinary action taken as a result of the report. The Council responded by stating that it was agreed that disciplinary investigations should take place in respect of the staff identified in the report's recommendations. On completion of these investigations, it was decided that the staff had not breached the standards sufficiently to warrant formal disciplinary action, but management action was taken in respect of those staff. This was confirmed in a report to the Council's Policy and Resources Committee on 4 December 1995. This public report provided a summary of the Procter report and a summary of action the Council had taken in relation to that report.
26. Section 40(2)² of the Act exempts the personal data of a third party from disclosure if this would breach any of the data protection principles or section 10

¹ See legal annex for relevant extract of legislation

of the Data Protection Act. The Commissioner has considered whether the First Data Protection Principle² would be breached.

27. In the Commissioner's Awareness Guidance No.1: Personal Information, the following is stated on page 5 under the sub-heading 'Private or Public Lives?':

"information such as home addresses or internal disciplinary matters would not normally be disclosed."

28. In this case, the Commissioner looked through the report to see what the remit of Dudley Procter's investigation was and whether the information contained within it could be classed as 'internal disciplinary matters'. At point 3 of Appendix 1 to the report, Dudley Procter states that, among other recommendations:

"The investigation will bring forward recommendations as to whether...disciplinary proceedings should be instituted against any officer(s)."

29. The Commissioner considers therefore that the report would constitute information on internal disciplinary matters.
30. The Commissioner accepts that employees would have a reasonable expectation that information on the internal disciplinary process would not be disclosed to the public. The Commissioner also accepts that the employees would have engaged with the report and the managerial reviews after its completion of the report on the basis that the information was not disclosed.
31. The Commissioner has also considered the seriousness of the fire at Norfolk Central Library. Thousands of records were destroyed and a new library had to be built. A lot of public money was spent in re-establishing this important public service. Despite these serious consequences, the Commissioner considers that it would be unfair to the data subjects to release the information (after taking into account the seniority of the employees and whether they have a public facing role. In view of this, disclosure would breach the First Principle of the Data Protection Act. The Commissioner has therefore decided that the Council is entitled to withhold information under section 40(2).

Section 36 (effective conduct of public affairs)

32. The Council applied section 36(2)(b) and (c) to the same information to which it had also applied section 40(2). As the Commissioner has already decided that the Council is entitled to withhold the information under section 40, there is no need to consider the application of section 36 any further in relation to that information.

² See legal annex for relevant extract of legislation

The Decision

33. The Commissioner's decision is that the public authority has provided all the information it holds in relation to the invoices from electrical contractors, the subject of the first part of the complaint, in compliance with section 1(1)¹ of the Act.
34. The Commissioner has also decided that the information withheld by the public authority was exempt under section 40 of the Act. Therefore, the public authority complied with section 1(1) of the Act by withholding this information.

Steps Required

35. The Commissioner requires no steps to be taken.

Right of Appeal

36. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 23rd day of April 2007

Signed

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

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

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

Section 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).”

First Principle of the Data Protection Act

The First Principle of the Data Protection Act is set out at Part 1 of Schedule 1 of that Act and states the following:

“1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”