

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 10 September 2007

**Public Authority:** Cambridgeshire County Council  
**Address:** Shire Hall  
Castle Hill  
Cambridge  
CB3 0AP

### Summary

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The complainant requested information from the public authority on the attendance in work of an individual on a specific day. The public authority refused the request by applying section 40(2) of the Freedom of Information Act. Following the Commissioner's intervention, the public authority confirmed to the complainant that it held the information but maintained its application of section 40(2) to withhold the information itself. The Commissioner upheld the public authority's application of section 40(2) but found that the public authority did not issue a timely or adequate refusal notice in accordance with section 17 of the Act.

### The Commissioner's Role

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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

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2. On 14 March 2005, the complainant asked the public authority for the following information:  
  
"Please could you inform me if [name redacted] of [address redacted] was working on 23-1-1984."
3. On 17 March 2005, the public authority wrote to the complainant with the following response:

“Under the Data Protection Act 1998 [the “DPA”], we are only able to release personal information about individuals if we have the express consent of those individuals to do so.”

4. On 19 December 2005, the complainant wrote to the public authority asking it to reconsider its decision. On 22 December 2005, the public authority wrote to the complainant stating that it considered that disclosure of the information would offend the right to confidentiality under the DPA of the person about whom the complainant had requested information.
5. On 6 January 2006, the public authority wrote to the complainant stating that it was formally refusing his request under section 40 of the Act.
6. On 25 January 2006, the complainant wrote to the public authority asking it to review its decision. On 1 February 2006, the public authority wrote to the complainant stating that it was upholding its decision not to release the information as the DPA prevented it from doing so.

## The Investigation

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### Scope of the case

7. On 20 February 2006, 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 the public authority's failure to provide the information. The Commissioner has therefore considered whether the public authority was right to withhold the requested information.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology

#### 5 January 2007

9. The Commissioner wrote to the public authority asking whether it held any information in response to the request. The Commissioner asked the public authority to confirm, if information was held, which principle of the DPA would be contravened by release of the information and why this would be so.

#### 19 January 2007

10. The public authority wrote to the Commissioner stating that the information it held did not enable it to positively state whether or not the individual was in work on the specific day. However, the public authority indicated that responding to the request would contravene principles 1, 2, 4 and 6 of the DPA.

### **7 February 2007**

11. The Commissioner wrote to the public authority asking it to confirm whether it was refusing to confirm or deny whether the information is held. The Commissioner also asked the public authority, if that was its wish, to explain its reasons and cite the relevant DPA principles.

### **27 February 2007**

12. The public authority wrote to the Commissioner confirming that it was refusing to confirm or deny whether it held information in response to the request. It explained that simply confirming or denying whether information was held would contravene the first and second principles of the DPA.
13. The public authority explained that the first principle would be contravened because disclosing information about an individual's attendance at work would not be compatible with the purpose for which the public authority collected and retains the information.
14. The public authority explained that the second principle would be contravened because providing information to a third party in order for them to establish the individual's whereabouts on a specific day would not be fair without the individual's consent or knowledge.

### **11 April 2007**

15. The Commissioner wrote to the public authority stating that he understood that the public authority did not in fact hold any information in response to the request. He also informed the public authority that he was not initially convinced of the arguments for neither confirming nor denying that the information was held. He asked the public authority for a further explanation of its refusal to confirm or deny.

### **10 May 2007**

16. The public authority wrote to the Commissioner confirming that it did in fact hold information in response to the request and explained this. Records are held which record absences so it is possible to say whether an individual was absent on a specific day. The public authority also provided a further explanation of its refusal to confirm or deny whether the information was held.

### **16 May 2007**

17. The Commissioner wrote to the public authority informing it that he was still not convinced of the arguments for refusing to confirm or deny that the information was held. The Commissioner also requested further information from the public authority in order to consider whether the information itself should be disclosed.

## **7 June 2007**

18. The public authority provided the information requested by the Commissioner in the letter of 16 May 2007.

## **12 June 2007**

19. The Commissioner wrote to the public authority stating that he did not consider that any of the DPA principles would be contravened if the public authority confirmed or denied that the information was held. He stated that a Decision Notice would very likely require the Council to confirm or deny this to the complainant. The public authority then wrote to the complainant on 14 June 2007 confirming that it held information in response to the request.

## **Analysis**

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### **Procedural matters**

#### **Refusal notice**

20. The complainant submitted his request on 14 March 2005. However, the public authority did not inform the complainant that it was applying section 40 of the Act to refuse his request until 6 January 2006.
21. The complainant requested an internal review and received a response from the public authority. However, the public authority did not at any stage inform the complainant of the details of its internal review procedure.

### **Exemption**

#### **Section 40 (personal information)**

22. Since the public authority has now confirmed to the complainant that the information is held (see paragraph 20 above), the Commissioner has limited himself to considering whether the information itself can be withheld by virtue of section 40 of the Act.
23. The public authority had stated that the first and second principles of the DPA would be contravened when it initially decided not to confirm or deny whether information was held. The supporting reasons it provided appeared to the Commissioner to also be reasons for withholding the information itself. Accordingly, the Commissioner has firstly considered whether the first principle of the DPA would be contravened.

## First principle<sup>1</sup>

24. The public authority has informed the Commissioner that the data subject in this case would have a reasonable expectation that the information held would remain confidential. In addition, the public authority has stated that such an expectation would apply to all its employees both past and present for whom the same information was held.
25. The public authority has registered with the Commissioner the use of the personal data it holds. From the description provided by the public authority of the information, the subject of this complaint, the Commissioner is satisfied that it would fit within the category registered for the purpose of staff administration. In addition, the data subject would clearly have a reasonable expectation that the information would only be used for that purpose and not be disclosed to a member of the public. The Commissioner is therefore satisfied that disclosure of the information would be unfair and would contravene principle 1 of the DPA. This in turn means that the information is exempt by virtue of section 40(2) of the Act.

## Second principle

26. The Commissioner is satisfied that disclosure of the information would contravene the first principle of the DPA and has therefore not considered it necessary to analyse the second principle.

## The Decision

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27. The Commissioner's decision is that the public authority:
  - dealt with the request for information in accordance with section 1(1)<sup>2</sup> of the Act by withholding the information using the exemption under section 40(2);
  - did not deal with the request for information in accordance with section 17(1)<sup>1</sup> of the Act as it did not inform the complainant that it was applying section 40(2)<sup>1</sup> of the Act to refuse the request within the 20 working days permitted; and
  - did not deal with the request for information in accordance with section 17(7)(a)<sup>1</sup> of the Act by failing to inform the complainant of the details of its internal review procedure

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<sup>1</sup> See legal annex for relevant extract of legislation

<sup>2</sup> See legal annex for relevant extract of legislation

## Steps Required

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28. The Commissioner requires no steps to be taken.

## Right of Appeal

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29. 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](mailto: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 10<sup>th</sup> day of September 2007**

**Signed .....**

**Gerrard Tracey  
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 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.”

**Section 17(7)** provides that –

“A notice under subsection (1), (3) or (5) must-

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure

**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”