Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 10 April 2007

Public Authority: Leeds City Council
Address: Civic Hall
Calverley Street
Leeds
LS1 1UR

Summary

The complainant requested copies of the responses given to a market research exercise undertaken by Swift Research Ltd ("Swift") on behalf of Leeds City Council (the "Council"). The Council concluded that it did not hold the requested information, as it only asked Swift to provide it with a final report and not the completed questionnaires. The Commissioner found that the questionnaire responses, however not the names and addresses of those asked to complete the survey or the respondents to it, were held by Swift on behalf of the Council. The Commissioner therefore requires the Council to supply the complainant with the questionnaire responses, in such a way that individual respondents may not be identified.

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 10 February 2006 the complainant requested the following information in accordance with section 1 of the Act:

> "I am writing to seek access under the Freedom of Information Act 2000 to all the consultation responses received as part of the recent 'public consultation' or 'opinion survey' conducted by Swift Research Ltd on behalf of Leeds City Council on the future of St Ann's Mills and Abbey Mills in

> Kirkstall, Leeds. I wish to see the names and addresses of all the people who were contacted during this exercise, and also their replies, if any".

3. On 1 March 2006 the Council responded to the complainant. It held that the information was exempt from disclosure under section 40 of the Act (personal information), as it claimed disclosure would breach the first data protection principle, and section 41 of the Act (information provided in confidence).

4. The complainant asked for this decision to be reviewed. This request for internal review was acknowledged by the Council on 28 March 2006.

5. The internal review outcome was communicated to the complainant by letter of 27 April 2006. It stated that:

> "the Council does not actually have the details you have requested. The commission that Swift undertook on behalf of the Council did not require them to supply data at an individual level… it therefore seems to me questionable whether the Council actually has access to the information you have requested…I therefore concur with the earlier responses that it would be inappropriate to release the information requested and beyond this would question whether this is an appropriate FOI request given that the Council has no direct access to the information requested".

6. The Council confirmed in an email to the Commissioner of 10 May 2006 that it did not hold the information under section 3(2) of the Act, "given it could not be said that Swift was holding this information on the Council's behalf in any sense".

The Investigation

Scope of the case

7. On 5 May 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 assertion that the information was not held by the Council or by Swift on behalf of the Council. The complainant submitted a number of documents, which had been supplied to him by the Council in response to a further request for information, in support of his argument that the information was held by or on behalf of the Council.

8. In defining the scope of the investigation, the Commissioner explained to the complainant that he would first undertake to ascertain whether the information was held by the Council or on behalf of the Council by Swift, and would then consider whether the stated exemptions had been applied correctly.

9. 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

10. The Commissioner wrote to the Council on 1 August 2006. He highlighted relevant sections of the contractual documents supplied by the complainant which supported the notion that the information was held by or on behalf of the Council. The Council was asked whether it agreed that the information was held by Swift on behalf of the Council and to explain any arguments to the contrary.

11. On 8 August 2006 the Council responded to the Commissioner. It stated that the documents the Commissioner had referred to were "framework" documents only, used in relation to all of the Council's market research projects, and that there were other documents that the Commissioner was not aware of that made specific arrangements in relation to each survey to be undertaken. The Council stated:

> "the survey documentation agreed between the Council and Swift in this case makes it quite clear…that the Council was not to be provided with name and address information".

The Council enclosed copies of both the postal and door to door survey forms.

12. The Commissioner wrote back to the Council on 23 August 2006. He asked it to clarify how the questionnaire recipients were selected and whether the Council was to be provided with the names and addresses of the questionnaire recipients and respondents following completion of the survey. Further, the Council was asked to confirm whether it considered the questionnaire responses themselves to be held by or on behalf of the Council.

13. On 11 September 2006 the Council responded. It stated that the questionnaire recipients were selected by Swift. The Council also informed the Commissioner that neither the name and address data, nor the completed questionnaires with names and addresses removed, were to be provided to it following completion of the survey.

14. The Council's letter of 11 September 2006 did not provide the detail the Commissioner required to take a decision and so he telephoned the Council on 21 September 2006 to progress the investigation. The Commissioner asked the Council to provide written evidence that Swift was not required to return the completed questionnaires to the Council following completion of the survey. The Commissioner confirmed details of this telephone conversation with an email on 29 September 2006.

15. The Council responded on 3 October 2006 and supplied copies of a number of emails and other correspondence which it believed proved that Swift did not hold the questionnaire responses on the Council's behalf.

16. The information supplied by the Council did not provide sufficient detail to enable the Commissioner to decide whether the requested information was held by or on behalf of the Council, and so he wrote again on 25 October 2006.

17. In its letter to the Commissioner of 3 October 2006 the Council had stated that whilst the framework contractual documents provided:

> "the Council will have the right to inspect hard and soft copy data at any time during the contract period. Thereafter, and when the contract is spent, all hard and soft copy data must be given over to the Council…"

it did not consider "data" to be defined to include the questionnaire responses. However, the Council also stated that:

> "[it] would clearly wish to impose this requirement [the right to be provided with responses] so that it was always in the position to verify the apparent outcome of a particular research exercise, or indeed to protect its ability to use particular information after the conclusion of particular research projects…"

18. The Commissioner, in his letter of 25 October 2006, asked the Council to reconcile the extracts quoted above. Further, he asked if the Council had additional information which demonstrated the specific arrangements made with Swift regarding data which would be provided to the Council following the performance of the contract, and if so to forward it for his consideration.

19. The Council responded on 2 November 2006. It reiterated the argument that copies of emails it had submitted between Swift and the Council's development department demonstrated that 'data' had not been interpreted to include individual questionnaire responses in relation to this market research exercise. The Council also stated that, as Swift would require a payment of approximately £500 to supply the questionnaire responses, "the Commissioner can only fairly conclude the response data is not held by the Council in the sense that the Council has no legal right to it under the current contract arrangements". Further, it stated that "the Council regards the whole of this request as having nothing to commend it in terms of the public interest in the disclosure of information".

20. Having omitted some information from its email of 2 November 2006, the Council contacted the Commissioner again, on 3 November 2006. The Council stated it considered that, if the Commissioner concluded the information was held by the Council, it would be exempt under section 41 of the Act (information provided in confidence) and section 21 of the Act (information accessible to the applicant by other means), as the complainant had already been provided with a copy of Swift's final report.

21. The Commissioner telephoned Swift on 17 November 2006, to enquire as to what it considered to be requirements of the contract between Swift and the Council in relation to this particular research exercise, especially whether it believed Swift retained the questionnaire responses for its own purposes. The Commissioner followed this telephone call with an email of 20 November 2006, to confirm the details of the conversation.

22. Swift responded in writing on 21 November 2006. It stated that it disagreed with the Council's view that Swift held the questionnaire responses for its own

purposes, and stated that Swift "viewed these items as part of the client's data set, so clients are entitled to request them if they need them".

23. On 21 December 2006 the Commissioner wrote to the Council and to the complainant and set out his detailed findings to the investigation so far. The complainant responded fully on 8 February 2007 and set out how he wished the complaint to be concluded. The Commissioner tried, unsuccessfully, to contact the Council by telephone on 9 February 2007, and he therefore communicated the complainant's comments to the Council by email of 12 February 2007.

24. The Council responded later on 12 February 2007. It stated that it believed that to provide the information which was not exempt may exceed the appropriate limit of £450 (for 18 hours work) as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations"). It asked the Commissioner for his views on what activities could be taken into account for the purposes of assessing whether the appropriate limit had been breached.

25. The Commissioner responded to the Council on 14 February 2007. He directed the Council to consider the Fees Regulations when calculating the appropriate limit and asked to be supplied with a breakdown of costs/hours of work which demonstrated how the appropriate limit would be exceeded. The Commissioner asked for a response by 28 February 2007 at the latest, in view of the length of time the Council had already been allowed to make submissions as to how it believed the complaint should be handled.

26. By 1 March 2007 the Commissioner had not received a response from the Council regarding the appropriate limit, and so he telephoned the Council and left a message. As the Commissioner did not receive a call back, he sent an email to the Council on 2 March 2007. The Council was asked to respond fully to the Commissioner's letter of 14 February 2007 by 5.30 pm on 6 March 2007.

27. The Council wrote to the Commissioner by email on 5 March 2007. It stated that it believed the appropriate limit would be exceeded by responding to the complainant's request, and provided a breakdown of costs to support its view. The Council stated that it was "minded to offer to deal with this request under section 13, if [the complainant] is prepared to pay the necessary fee determined under the regulations".

28. The Commissioner responded to the Council on 6 March 2007. He informed the Council that a Decision Notice would be served outlining his conclusions to the investigation.

Analysis

Procedural matters

General rights of access

29. The Commissioner has considered whether the Council has complied with section 1 of the Act.

30. Section 1(1) provides:

"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."

31. The Council has stated that it does not hold any of the information requested by the complainant. The Commissioner has investigated whether this is the case.

Information held / not held for the purposes of the Act

32. The Commissioner has considered whether the public authority was correct in its assessment that the information was not held by it or on its behalf by Swift.

33. Section 3(2) states:

"For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority".

34. The request identifies two categories of information: the names and addresses of all the individuals contacted and asked to complete the survey; and the survey responses. However, following his investigation and owing to the way in which the information is held, the Commissioner has identified that the information requested by the complainant can be split into three parts as follows:

(i) the names and addresses of all the people who had been asked to complete the survey;
(ii) the names and addresses provided in response to the survey; and
(iii) the survey responses.

Each will be considered in turn below, where the reasons for dividing the requested information into three subsections will become apparent.

Request part (i)

35. In its letter of 11 September 2006, the Council stated that Swift were responsible for choosing which members of Kirkstall Ward should receive either the postal questionnaire or be approached for a door to door interview. The Council submitted relevant sections of Swift's final report in support of this. Swift confirmed this was the case in its email to the Commissioner of 21 November 2006.

36. The Commissioner is therefore satisfied that this information is not held by or on behalf of the Council.

Request part (ii)

37. The Council enclosed copies of both the door to door and postal surveys with its letter to the Commissioner of 8 August 2006.

    The door to door survey stated, "All of the answers you provide will be totally anonymous". The postal survey stated, "All of the data will be returned to Swift and treated in the strictest confidence. We will only use your name and contact details to contact the winner of the prize draw or if you request further information from us".

    The Council explained that these statements make it clear that the arrangements it had made with Swift did not envisage the names and addresses of the questionnaire respondents would be provided to the Council. Swift confirmed to the Commissioner in its telephone conversation of 17 November 2006 that this was also what it had understood. This is further demonstrated by the fact the questionnaire did not require names and addresses of respondents to be provided. Respondents were only asked to provide these details if they wished to be entered into a prize draw, following submission of the survey.

38. The Commissioner is therefore satisfied that this information is not held by or on behalf of the Council.

Request part (iii)

39. The Commissioner highlighted the following extract from one of the Council's framework contractual documents (entitled "Corporate Market Research Framework Contract" under the heading of "Project Brief and General Information") in a letter to the Council dated 1 August 2006:

> "Leeds City Council and its authorised officers will have the right to inspect hard and soft copy data at any time during the contract period. Thereafter, and when the contract is spent, all hard and soft copy data must be given over to the Council, with no copy remaining – electronic or paper – external to the Council. The Council has full ownership of the data…"

It was suggested to the Council that this statement indicated that the questionnaire responses themselves were held by Swift on behalf of the Council. The Commissioner asked for the Council's comments on this issue.

40. The Council argued that it had not agreed with Swift that the questionnaire responses (with the name and address information removed) should be provided to the Council and stated that the 'Main Findings' section of Swift's final report was sufficient for its purposes.

41. In order to verify the Council's argument, the Commissioner asked to be provided with documentary evidence that the questionnaire responses were not held by Swift on the Council's behalf. He stated that this information could either be in the form of a formal contractual document or perhaps emails between the Council and Swift confirming the arrangements that had been made between them.

42. The Council provided copies of emails sent between it and Swift, and a copy of the Corporate Market Research Framework contract. It stated that there was no further formal contract between it and Swift in relation to this particular market research exercise, and that the arrangement was concluded within the terms of the framework contract. The Council explained that the complainant had interpreted the provision quoted in paragraph 39 above to mean it had a contractual right to the information he had requested, however suggested that the extent to which this may be correct would depend upon the definition of the word 'data', which was not defined in the framework contract. The Council stated:

> "[we] would clearly wish to impose [the requirement quoted at paragraph 39] so that [we were] always in the position to verify the apparent outcome of a particular research exercise, or indeed to protect [our] ability to use particular information after the conclusion of particular research projects…"

and claimed it would have expected an explicit clause to be included in the contract if Swift had been required to provide the information requested by the complainant.

43. On 25 October 2006 the Commissioner wrote to the Council and queried the statement quoted in paragraph 42. He explained that it appeared to him the Council was implying that it may recall the questionnaire responses for quality monitoring purposes or to use the responses for some other purpose following conclusion of its contract with Swift, however could not recall the information from Swift for the purposes of supplying it in response to a request for information under the Act. The Commissioner asked the Council for its comments on this issue.

44. The Council responded on 2 November 2006 that its statement in paragraph 42 meant that the Council may wish to have the provision about inspection and ownership of data in its framework contract to protect its position in relation to particular research exercises or projects, however it had not interpreted 'data' to include individual responses in relation to this research exercise.

45. On 17 November 2006 the Commissioner telephoned Swift to check its understanding of the contract with the Council. Swift stated that it had understood that all of the questionnaire responses belonged to the Council, although a specific discussion about this had not taken place, as this was the typical arrangement it had with all its clients. Further, Swift explained that it believed the questionnaire responses could be provided to the Council within the terms of the existing contract. Details of this conversation were confirmed in writing by emails of 20 and 21 November 2006.

46. The Commissioner is therefore satisfied that the information at part (iii) of the request is held by Swift on the Council's behalf.

Fees

47. The Commissioner has considered whether the Council correctly assessed the appropriate limit when considering the complainant's request.

48. Section 12(1) of the Act states:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

49. The Fees Regulations set the appropriate limit at £450 for local authorities. This equates to 18 hours of staff time (charged at £25 per hour). Regulation 4(3) provides that public authorities may only legitimately refuse requests for information on fees grounds if it would take more than 18 hours for a local authority to:

a) determine whether it holds the information requested;
b) locate the information requested;
c) retrieve the information from a document containing it; and
d) extract the information from a document containing it.

50. In its letter to the Commissioner of 11 September 2006, the Council suggested that it would cost approximately £500 for Swift to provide it with the questionnaire responses. The Commissioner queried this charge. He directed the Council to the Fees Regulations and the four factors listed in paragraph 49, and asked the Council to provide a breakdown as to how the £500 figure was arrived at, if the Council intended to use the Fees Regulations as a further basis for refusing to comply with the complainant's request.

51. The Council responded on 2 November 2006 and stated that it could not "see how the Council could properly regard [responding to the request] as exceeding the appropriate limit under the strict terms of the regulations" however asked the Commissioner to take the £500 fee quoted by Swift into account as evidence the requested information was not held by the Council.

52. The issue of the appropriate limit was raised again by the Council on 12 February 2007. The Commissioner allowed the Council to submit a breakdown of costs it believed would be incurred in responding to the complainant's request.

53. The Council estimated that the total cost of responding to the request would be £625, as it was envisaged it would take 20 hours of staff time to prepare the information for release. It provided the following breakdown of costs/time by way of an explanation:

i) 1 hour of discussion involving three staff in the Development department, to review the request and discuss with other parties issues regarding the "ownership" of the data and how and where it is held. (3 hours/£75)
ii) 2 hours of discussion for the Head of Property, Finance and Technology with the Development department. Further, the Council suggested that it should be able to take into account the time the Head of Property, Finance and Technology had spent discussing with the Commissioner the issue of whether the requested information was held. (2 hours/£50)
iii) 7.5 hours for 2 administrative assistants to carry out the following activities:

I. remove the questionnaires from storage;
II. review the questionnaires to remove any identifying information (names, addresses and other information which may identify respondents);
III. photocopy all of the questionnaires (cost of staff time and black and white photocopying taken into account);
IV. deliver the photocopied questionnaires to the Council's offices; and
V. return the questionnaires to storage. (15 hours/£500)

54. The Council estimated it would take the administrative assistants 15 hours to do the activities listed in paragraph 53 points iii I to V, however calculated this to equate to a £500 charge. Regulation 4(4) of the Fees Regulations allows public authorities to estimate costs at £25 per person per hour. 15 hours work should, therefore, equate to a £375 charge. The Council has therefore erred in its calculation of the appropriate limit.

55. Furthermore, the Council may only take into account the following activities when calculating the appropriate limit:

i) discussions between staff in the Development department to determine whether the information is held (3 hours – 15 hours remaining before appropriate limit would be exceeded)
ii) discussions between the Head of Property, Finance and Technology and other staff at the Council to determine whether the information is held (but not the discussions with the Commissioner) (up to 2 hours – 13 hours remaining before appropriate limit would be exceeded)
iii) time for the administrative assistants to:

I. remove the questionnaires from storage.

The Council did not provide a breakdown of the time/costs involved in carrying out each of the activities listed in paragraph 53 iii I to V, however the Commissioner does not consider it would take the Council 13 hours to remove the questionnaires from storage, given that the Council estimated it would take 15 hours to complete all of the other activities concerned with providing the information to the complainant.

56. The Council argued that reviewing the questionnaires and removing information from them which identifies individual respondents, constitutes "extracting the information from a document containing it" and is therefore provided for in the Fees Regulations (Regulation 4(3)(d)). The Commissioner has interpreted "extracting information from a document containing it" to mean the process of extracting the requested information from a document containing other information which has not been requested. The process of "extracting" does not therefore include the removal of non-exempt information from a document, where either the whole document or a larger amount of the information contained within it had been requested, however some of it is considered exempt. The complainant requested the questionnaire response in its entirety, as set out in paragraph 2 and therefore the time taken to extract that which can be provided from each complete questionnaire cannot be taken into account when calculating the appropriate limit.

57. Regulation 6(3)(b) allows public authorities to charge complainants for "reproducing any document containing the information". The Commissioner considers public authorities should adopt the guide price of 10 pence per sheet for photocopying. This charge may be recovered from the complainant however cannot be taken into account when calculating the appropriate limit.

58. The Council cannot include the time taken to deliver the information to the Council's offices, nor to return the original copies of the questionnaires to storage, when calculating the appropriate limit. This is because these activities are not provided for in the Fees Regulations.

Advice and Assistance

59. The Commissioner has considered whether the Council provided adequate advice and assistance to the complainant.

60. Section 16(1) of the Act states:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".

61. The complainant has alleged that the public authority failed to discharge its obligations under section 16 of the Act, because the Council has "supplied vast amounts of false or misleading information… since 2004". It appears that this statement by the complainant refers to further requests for information he has made to the Council, and not to the complaint to which this Decision Notice relates.

62. The Commissioner has reviewed all of the evidence submitted by the complainant and the Council, and has considered the provisions of the Act and of the Code of Practice issued under section 45 of the Act. The Commissioner is satisfied that the Council has not breached section 16 of the Act in respect of this request for information.

Exemption

Information accessible by other means

63. The Commissioner has considered whether the Council has correctly applied section 21 of the Act.

64. Section 21(1) provides –

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

65. The Council has stated to the Commissioner that, as the complainant already has access to the Main Findings section of Swift's final report, the information requested is reasonably accessible to him and therefore exempt under section 21 of the Act.

66. The Commissioner considers this interpretation to be incorrect. The Council only sought to refuse the request under section 21 when the Commissioner suggested the Council could provide the complainant with anonymous responses. The complainant had not requested anonymous responses; however the Commissioner had suggested provision of these may enable the complaint to be concluded informally. The questionnaire responses are not available to the complainant by other means. The complete questionnaire responses (including name and address information) are not available to the Council, as some of the information is held by Swift for its own purposes. The Commissioner has examined the Main Findings section of Swift's report, and does not believe the information to be the same as that requested by the complainant. This is because the report demonstrates only the total number of respondents who answered a certain way to each question – a single respondent's views cannot be 'tracked' through the series of questions. Further, some of the responses to questions which allow for a spontaneous response have been grouped into the category of "other". Provision of the questionnaire responses themselves would allow the complainant to establish how each individual respondent replied to such questions.

Information provided in confidence

67. The Commissioner has considered whether the Council has correctly applied section 41 of the Act.

68. Section 41(1) provides –

"Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

69. The Commissioner accepts that the information requested by the complainant was obtained by the Council (via its agent, Swift) from 'any other person' (the questionnaire respondents) and therefore section 41(1)(a) is met. Therefore, the Commissioner's investigation has focussed on the extent to which disclosure of the information requested may constitute an actionable breach of confidence.

70. Two scenarios have been envisaged: disclosure of questionnaire responses where the answers can attributable to individuals, because they include information from which individuals may be identified; and disclosure of questionnaire responses where the responses have been anonymised by removal of such identifying information. The Commissioner has not examined the actual responses given to the questionnaire, however has formulated his decision having studied the postal and door to door survey forms, and has contemplated the sort of responses that are likely to have been provided.

71. The Commissioner has considered the following factors when deciding whether disclosure of the information would constitute an actionable breach of confidence:

i) is the information of a confidential nature?
ii) what detriment may arise if the information is released?
iii) is there a strong public interest in breaching confidentiality?

Disclosure where the response is attributable to an individual

72. The information contained within the questionnaire responses can be said to be of a confidential nature. This is because the postal survey states in its opening paragraph that "all of the data will be returned to Swift and treated in the strictest confidence". The door to door script states "all of the answers you provide will be totally anonymous". These statements create an expectation that the information will not be attributed to individuals. Further, some of the information is of a particularly sensitive nature, as it concerns the ethnic origin, age and employment status of individual respondents.

73. There may be a detriment to individual respondents if replies which can be attributed to them are disclosed under the Act. Respondents may be contacted because of the views they have expressed in reply to the survey, and this may constitute an invasion of their privacy. The Act is applicant and motive blind, and as such public authorities may not take into account the identity of the person requesting the information or the purposes for which the information may be used, when responding to requests for information. However, the complainant has stated that if he was provided with the information requested, he would wish to "contact [the respondents] individually to correct the serious misinformation that the Council has distributed to them".

74. Information which is otherwise protected by the common law duty of confidentiality may be disclosed if there is a strong public interest in disclosure. This test makes it necessary to consider whether there is an overriding public interest in the information being made available. This is a different test to that set out in section 2(2)(b) of the Act, as the section 41 exemption is absolute not qualified. The Commissioner does not consider that the complainant has adduced sufficient evidence to demonstrate that there is an overriding public interest in the disclosure of questionnaire responses which can be attributable to individuals, nor has his investigation uncovered any evidence of this.

Disclosure where the response is anonymous

75. The statements quoted at paragraph 72 create an expectation that the information provided in response to the questionnaire will not be attributable to individuals. Therefore if the information is supplied under the Act in a way that does not disclose the identity of the respondent, for example by removing their names and contact details, and any other information which may identify them, the information will not be 'of a confidential nature'.

76. The Council has not adduced any arguments to suggest that there would be a detriment to the questionnaire respondents if anonymised questionnaire responses were disclosed, nor has the Commissioner identified circumstances in which it would be unfair to release totally anonymised data to the complainant in this instance. The Commissioner is therefore satisfied that there is no detriment in releasing anonymous data to the complainant.

77. The Commissioner has therefore concluded that to release the anonymised information would not constitute an actionable breach of confidence.

Personal information

78. The Council has stated to the Commissioner that the information should not be provided to the complainant on the grounds that to do so would breach the data protection principles (as set out in Schedule 1 of the Data Protection Act 1998 (the "DPA")).

79. The Commissioner has already concluded that to release information which may be attributable to an individual would constitute a breach of section 41 of the Act. He has therefore limited consideration of the section 40 exemption to that information which is not exempt under section 41.

80. Section 40 of the Act allows public authorities to refuse to supply information in response to requests under the Act where the information constitutes the personal data of a third party and where disclosure of such personal data would breach one or more of the data protection principles.

81. Personal data is defined in section 1(1) of the DPA 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.

82. Information which cannot be attributable to individual respondents does not constitute personal data and therefore it would not breach the DPA, nor section 40 of the Act, to release this information.

The Decision

83. 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:

- Section 1, in relation to parts i and ii of the request;
- Section 3(2), in relation to parts i and ii of the request;
- Section 16; and
- Section 41, in relation to information which may be attributable to individuals.

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

- Section 1, in relation to part iii of the request;
- Section 3(2), in relation to part iii of the request;
- Section 12;
- Section 21;
- Section 40, in that the anonymised information does not constitute personal data; and
- Section 41, in relation to information which may not be attributable to individuals.

Steps Required

84. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

The Council must provide the complainant with copies of the questionnaire responses, in such a way that individual respondents cannot be identified.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

85. 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.

Right of Appeal

86. 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 10th day of April 2007

Signed ……

Graham Smith
Deputy 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."

Section 1(2) provides that –

> "Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

> "Where a public authority –
>
> (a) reasonably requires further information in order to identify and locate the information requested, and
>
> (b) has informed the applicant of that requirement,
>
> the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –

> "The information –
>
> (a) in respect of which the applicant is to be informed under subsection (1)(a), or
>
> (b) which is to be communicated under subsection (1)(b),
>
> is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

> "A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –

> "In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

Information held by or on behalf of a public authority

Section 3(2) provides that –

> "For the purposes of this Act, information is held by a public authority if –
>
> (a) it is held by the authority, otherwise than on behalf of another person, or
> (b) it is held by another person on behalf of the authority."

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

> "Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

Section 12(2) provides that –

> "Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

Section 12(3) provides that –

> "In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases."

Section 12(4) provides that –

> "The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –
>
> (a) by one person, or
>
> (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
>
> the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them."

Section 12(5) – provides that –

> "The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Duty to provide Advice and Assistance

Section 16(1) provides that –

> "It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".

Information Accessible by other Means

Section 21(1) provides that –

> "Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

Section 21(2) provides that –

> "For the purposes of subsection (1)-
>
> (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
> (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment."

Section 21(3) provides that –

> "For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."

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."

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)."

Section 40(5) provides that –

> "The duty to confirm or deny-
>
> (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
>
> (b) does not arise in relation to other information if or to the extent that either-
>
> (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act

1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”