

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 May 2008

Public Authority: Caerphilly County Borough Council
Address: Nelson Road
Tredomen
Ystrad Mynach
Hengoed CF82 7WF

Summary

The complainant requested information relating to individuals excluded from schools within the local authority area as a result of drug finds. Some information was provided, but the public authority refused to provide information at individual school level, citing the exemption at section 40 of the Act. The Commissioner's decision is that the public authority applied the Act appropriately in withholding the information requested by virtue of the exemption at section 40.

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 12 May 2006 the complainant requested the following information from the public authority:

"Could you provide details for me of all reported exclusions of pupils as a result of drug finds in local authority schools in your area.

"Please could you detail the number of excluded pupils in each named school where drug finds have been made during 2004 and 2005, including an overall total for those two years.

"Where the information is available could you detail the type of drugs found in each case such as:

AN Other School: 1 pupil excluded (one find of cannabis).

"In addition, if the information is available could you detail how many prosecutions have resulted following drug seizures in schools."

3. The public authority responded on 9 June 2006, stating that from September 2000 to 5 June 2006 there were 143 exclusions across the borough as a result of illegal substances. The authority disclosed that in 2004 there were 12 permanent and 16 fixed term exclusions, involving 7 named secondary schools and one unnamed primary school. In 2005 there were 8 permanent and 6 fixed term exclusions in 8 named schools. The authority confirmed that it holds no records in relation to prosecutions.
4. The public authority refused to provide the number of exclusions for each named school and the name of the one primary school, citing the exemption at section 40 of the Act. The public authority stated that it only held information about the type of illegal substance recovered in one of the incidents. However, whilst it confirmed that the substance on that occasion was cannabis, it refused to provide the name of the school where this occurred. Again, the exemption cited was section 40 of the Act.
5. The complainant contacted the public authority on 12 June 2006, seeking an internal review of the refusal. In particular, the complainant explained he wished the authority to consider its response to the following information:

"Please could you detail the number of excluded pupils in each named school where drug finds have been made during 2004 and 2005, including an overall total for those two years.
6. On 2 August 2006 the public authority responded, upholding its refusal and providing the complainant with details of how to contact the Commissioner. In its letter of 2 August 2006 the authority clarified that the exemption relied upon was section 40(2), and that disclosure would breach the first data protection principle.
7. On 7 August 2006 the complainant submitted his complaint to the Commissioner.

The Investigation

Scope of the case

8. On 7 August 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 following points:
 - That the information withheld is not personal data because he is not seeking the names of those excluded, and it would be very unlikely that individuals could be identified if the information requested were disclosed;
 - That other local authorities in the area had provided similar information; and

- The issue of drugs in schools is of significant public interest.

Chronology

9. On 4 January 2007 the Commissioner wrote to the public authority to find out more information about the authority's reasons for refusing the request. The Commissioner requested a copy of the information withheld and answers to the following questions:
 - Why does the authority consider the information withheld to be 'personal data' within the definition set out in section 1(1) of the Data Protection Act 1998 (the 'DPA')?
 - Which data protection principles would be breached if the information were to be disclosed?
 - What other special circumstances exist in the Council's area that led to the decision to exempt the information?
10. On 5 January 2007 the Commissioner wrote to the complainant to explain that his case had now been allocated to a case officer. The complainant responded on 8 January 2007, asking the Commissioner to take into account the fact that reports written by Her Majesty's Chief Inspector of Schools in Wales (and available on her website) detail the number of exclusions at individual schools and are not withheld.
11. On 29 January 2007 the public authority wrote to the Commissioner to explain that, in its opinion, the information withheld is personal data because:

"1. They are all data which relates to a living individual who can be identified from those data and other information which is in the possession of the data controller

2. ... they are data that is capable of having an adverse affect on privacy ...

3. And the data is processed by means of equipment operating automatically in response to instructions given for that purpose."
12. The public authority further explained that it considered the information to constitute sensitive personal data within the definition at section 2(g) of the DPA, because it relates to "the commission or alleged commission by him [the data subject] of any offence". In the light of this, the public authority argued that to disclose the information would breach the first and second data protection principles. In addition, the authority felt that any disclosure may also breach the sixth and seventh principles.
13. Following further correspondence, on 31 July 2007 the Commissioner wrote to the public authority, setting out his views on the question of whether the information withheld constituted personal data. In particular, the Commissioner looked at the possibility of anonymising the data. The Commissioner also pointed out a number of errors in the original figures sent to the complainant in response to his request.

14. The public authority responded on 28 August 2007, providing additional evidence to support its decision to withhold the information. In particular, the public authority provided copies of information disclosed in response to earlier freedom of information requests to demonstrate that a significant amount of information was already in the public domain.

15. The authority further argued that, while it could not possibly know what other information was in the public domain at any given time, there was a considerable risk of identifying individual data subjects:

“It is entirely realistic to suppose that evidence that a child was excluded from School X in a certain year for a drug related reason might be the one piece of evidence needed to confirm identification e.g. where a child in a new school is known to have come from School X in the middle of term, has not moved home, is still in the School X catchment, etc.”

16. The public authority also admitted to errors in its original calculations and agreed to resend the information it had initially disclosed to the complainant.

17. Following further discussions, the Commissioner contacted the complainant on 24 January 2008 setting out his preliminary views. The complainant responded on 4 February requesting that the Commissioner issue a formal Decision Notice.

Findings of fact

18. The complainant is seeking statistical information about individual schools. He is not seeking to discover the identity of any individual.

19. Information about exclusions from individual schools is already in the public domain. Overall figures for each school are included in reports compiled by Her Majesty's Chief Inspector of Schools in Wales, and may also be available from other sources. However, this information is not broken down into reasons for exclusion.

20. The public authority has put forward evidence which demonstrates that it has received a number of requests for school exclusion information. Other requests include the number of exclusions involving possession of firearms/weapons, and knives/blades.

21. The public authority has explained that the information withheld derives from a database of exclusions held by the public authority. It is possible to identify individuals from the information in the database.

Analysis

Exemption

Section 40

22. Section 40(2) of the Act provides an absolute exemption for information that constitutes the personal data of third parties, if its disclosure would breach any of the data protection principles, as set out in the DPA. The Commissioner has considered both questions below. All sections of the Act are reproduced in the attached legal annex.

Is the information 'personal data'?

23. Section 1(1) of the DPA states:

““personal data” means data which relate to a living individual who can be identified –

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

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual”

24. It is clear that the information withheld does relate to living individuals (the pupils concerned) and that those individuals can be identified by that information and other information in the possession of the 'data controller' (the public authority). This is because the statistical information requested by the complainant is itself derived from a wider database that includes the names of the data subjects.
25. Accordingly, it is the Commissioner's decision that the information requested does constitute personal data, within the definition at section 1(1) of the DPA (quoted at paragraph 23, above).

Would disclosure breach any of the data protection principles?

26. The second test under section 40(2) is whether the disclosure of the information would breach any of the data protection principles. The first data protection principle states:

“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.”

27. In this context, ‘processing’ is construed broadly and includes disclosure of the information requested. As the information withheld meets the definition of personal data, it can only be disclosed if to do so would be both fair and lawful, and in accordance with the conditions in Schedule 2.

‘Identifiability’

28. In considering ‘fairness’, the Commissioner has first looked at whether disclosure of the information withheld would lead to the identification of the individuals to whom the personal data relate. This is because if disclosure of the information withheld in this case could not lead to the identification of the data subjects, then it would be unlikely that such a disclosure could be considered ‘unfair’.

29. The Commissioner has drawn a parallel with the concept of an ‘identifiable person’ as set out in the European data protection directive (95/46/EC), which is implemented in the UK by the DPA:

““personal data” shall mean any information relating to an identified or identifiable natural person ...; an identifiable person is one who can be identified, directly or indirectly ...”

30. The Commissioner’s technical guidance on ‘what is personal data’ states:

“Sometimes it is not immediately obvious whether an individual can be identified or not, for example, when someone holds information where the names and other identifiers have been removed. In these cases, Recital 26 of the Directive states that, whether or not the individual is nevertheless identifiable will depend on "all the means likely reasonably to be used either by the controller or by any other person to identify the said person".

“Therefore, the fact that there is a very slight hypothetical possibility that someone might be able to reconstruct the data in such a way that the data subject is identified is not sufficient to make the individual identifiable for the purposes of the Directive. The person processing the data must consider all the factors at stake.

“The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

“When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies.”

31. In this particular case the information withheld constitutes the names of schools and the numbers of pupils at each named school that have been excluded for a specific offence. On the one hand this is purely statistical information that does not directly relate to individuals and the Commissioner has no doubt that the complainant in this case is not seeking to identify the individuals concerned. On the other hand, the Commissioner has taken into account that the information withheld could provide significant biographical details of individual young people that may not be widely known in their communities.
32. In order to determine whether the information withheld in this case can identify individuals the Commissioner has looked at various factors, including:
 - The absolute numbers of individuals excluded in each school in each area for each year
 - The numbers excluded for each different factor (drugs, assault, vandalism, etc) and the ratio of exclusions for each factor in relation to the total
 - Other information already in the public domain (whether published by the public authority or others, or information known in the community)
 - Other information not currently in the public domain but likely to be placed in the public domain in the future, including as a result of freedom of information requests
33. Taking into account all the above factors, the Commissioner believes that it would be possible for individuals to be identified if the information withheld were disclosed. The Commissioner believes this is more than a slight hypothetical possibility.

'Fairness'

34. Having determined that disclosure of the information withheld could lead to the identification of the individuals excluded, the Commissioner has looked at whether disclosure would nevertheless be fair.
35. The Commissioner believes that there is an expectation that schools and local authorities will not disclose the reasons for individuals being excluded. The exclusion of a pupil from school on any grounds is a serious issue which is likely to have an adverse impact on the young person concerned. Where the grounds for exclusion relate to the possession of illegal substances, the consequences for the individual could well be very serious indeed. The Commissioner is therefore in no doubt that the disclosure of personal information about a young person who has been excluded from school on such grounds would be unfair. Accordingly, the Commissioner's decision is that any disclosure of the information withheld would be unfair and therefore breach the first data protection principle.
36. The Commissioner therefore believes that the public authority has applied the Act appropriately in withholding the information withheld by virtue of the section 40 exemption, because the information constitutes personal data and its disclosure would be unfair.

37. As the Commissioner has determined that disclosure of the information withheld would breach the first data protection principle, he has not considered whether any of the other principles would have been breached if the information were disclosed.

The Decision

38. 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 applying the section 40 exemption appropriately

Steps Required

39. The Commissioner requires no steps to be taken.

Right of Appeal

40. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 19th day of May 2008

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”.”

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.