

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 May 2008

Public Authority: The Governing Body (The Corporation)
Address: The Hub
Doncaster College
Chappell Drive
Doncaster
DN1 2RF

Summary

The complainant requested information from Doncaster College relating to any investigation reports it holds concerning the conduct or financial issues relating to its senior managers over a four year period. The college refused this request under section 40(3) of the Freedom of information Act 2000. The Commissioner has concluded that the college should have cited section 40(2) of the Act. In failing to do so it breached section 17(1)(b) however he has not ordered any remedial steps in this regard. He considers that the requested information is the personal data of the subjects of various investigation reports, and of other data subjects. He has determined that disclosure of the reports would be unfair and therefore would breach the first data protection principle and has ordered no steps to be taken in this matter.

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 2 November 2006 the complainant made the following request to Doncaster College (the college):

'Under the terms of the Freedom of Information Act, please provide copies of any investigation reports held by the college involving the college's senior management/managers in the last four years. This would include reports on conduct or financial issues'.

3. The college wrote to the complainant on 8 November 2006 refusing to comply with his request. The college acknowledged that it held information relevant to the request but issued a refusal notice citing section 40(3) of the Act. This stated that the investigation reports concerning its senior *managers* *'contain personal data which, if disclosed, would contravene the data protection principles'*.
4. On 28 November 2006 the complainant wrote to the college seeking a review of its decision not to disclose the requested information.
5. The college concluded its internal review on 7 December 2006. It confirmed that it held reports involving its senior managers and upheld its decision to withhold the requested information on the basis that section 40(3)(a)(i) applied to it.

The Investigation

Scope of the case

6. On 7 December 2006 the complainant contacted the Commissioner to complain about college refusal to supply the information he had requested. The scope of the Commissioner's investigation is to determine whether the college was correct in withholding the requested information it held at the time the request was made.

Chronology

7. The Commissioner contacted the college on 17 July 2007 and asked it to provide him with copies of the withheld information. The college was asked to provide its reasons for applying the section 40 exemption and to identify the data protection principles that would be breached if the information was disclosed.
8. On 13 August 2007 the college responded to the Commissioner's requests. It provided an itemised file containing the withheld information and a supporting letter which outlined its application of section 40. The college informed the Commissioner that it considered that the first, second and sixth data protection principles would be breached by disclosing the reports it held. With regard to the first data protection principle, the college determined that none of the conditions contained in Schedule 2 of the Data Protection Act 1998 were satisfied. It also concluded that disclosure of the reports to the complainant is not a lawful purpose for processing. The college emphasised that the reports and associated documents were prepared solely for internal disciplinary purposes and therefore disclosure would contravene the second data protection principle. In relation to the sixth data protection principle, the college determined that disclosure would contravene the rights of the data subjects (together with witnesses and other parties) and would likely cause damage and distress to the data subjects.

9. On 29 August 2007 the Commissioner telephoned the college to make further enquiries. These concerned the number of reports relating to college senior managers in the past four years and the disciplinary procedures it had followed. Though the complainant did not raise concerns about the way that the college interpreted his request, the Commissioner considered it appropriate to enquire, for the sake of clarity, how it had defined 'college managers'.
10. The college informed the Commissioner that it would send him the policies and procedures it had followed in relation to disciplinary issues concerning management/managers. It confirmed the number of reports it held relevant to the request and explained that term management/manager applied to all members of its staff paid salaries in accordance with the 'Management Pay Spine' (approximately 35 persons).
11. To illustrate that it had followed its agreed policies for dealing with this type of disciplinary matter, on 5 September 2007, the college provided the Commissioner with the following:

Disciplinary Procedure – Senior Designated Post Holders
Individual Grievance Procedure – Senior Designated Post Holders
Disciplinary Procedure – All Staff
Individual Grievance Procedure – All Staff

Analysis

Procedural matters

12. In its refusal notice the college cited section 40(3)(a)(i) of the Act as its reason for withholding the requested information. Subsection 3 refers to the first condition that needs to be satisfied in order for section 40(2) to apply and only follows from the application of that subsection. In this case the college should have cited section 40(2) and explained that this applied by virtue of section 40(3)(a)(i). In failing to specify section 40(2) in its refusal notice the college breached the requirements of section 17(1)(b).

Section 40

13. Section 40(2) provides an exemption for information which is the personal data of any third party. Where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 ('DPA') subsection 3(a)(i) of section 40 is relevant.
14. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal data 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,
 - and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual'.
15. The college argued that the requested information constitutes the personal data of the subjects of the reports it holds. It also contended that the material is the personal data of persons who made allegations against managers, the witnesses involved in the investigation of these complaints and of the other individuals involved in the investigation process.
16. Information falling within the ambit of the complainant's request can be summarised as various allegations or complaints against staff who may be described as a college manager, and which have resulted in the creation of a report (either formative and summative).
17. Having reviewed the information supplied by the college, the Commissioner is satisfied that it is relevant to the complainant's request. The Commissioner is also satisfied that the information is personal data as defined at point 14 above. It is the personal data of persons making complaints and allegations against college managers; of witnesses to events relevant to these allegations; and of persons mentioned in correspondence which relates to these allegations.

The first data protection principle

18. The college has argued that disclosure of the requested information would breach the first data protection principle and therefore it is exempt from disclosure under the Act.
19. The first data protection principle has two components:
 1. The personal data must be processed fairly and lawfully, and
 2. Personal data shall not be processed unless one of the conditions in the Data Protection Act (DPA) Schedule 2 is met.
20. The college argued that disclosure of the requested information would constitute the processing of personal data and that this processing would not fulfil any of the conditions for compliance with the first principle set out in Schedule 2 of the DPA.
21. The Commissioner agrees with the college that the relevant principle in respect of the complainant's request is the first principle: the requirement that processing should be fair and lawful.
22. In the Commissioner's view, the right to access official information and the right to investigate allegations and complaints made by and against its employees are not mutually exclusive. A balance has to be struck between the public authority's obligation to be transparent and accountable about its decisions with its duty to respect its employee's reasonable expectations of privacy.
23. The Commissioner has considered the withheld information and the reasonable expectations of the data subjects concerning the release of the requested material. The Commissioner recognises that there is a widespread expectation that the details of a person's employment should be considered confidential. There is also a recognised expectation that information about the internal disciplinary matters of an individual is private.
24. In his guidance on section 40, the Commissioner makes it clear that the seniority of the official should be taken into account when personal data is requested under the Act: 'It may also be relevant to think about the seniority of staff generally: the more senior a person is, the less likely it will be to disclose information about him or her acting in an official capacity would be unfair'.
25. The principal data subjects caught by this request (the focus of the investigation reports) are caught because they fall within the Management Pay Spine and may be said to be relatively senior officials within the college. It is commonly held that the employment details of such individuals are routinely placed in the public domain, for example their roles and job descriptions and their salary bands. However, in this instance the majority of the information sought consists of material not usually available to the public.
26. The Commissioner notes the decision of the Information Tribunal in the case of *House of Commons v The Information Commissioner and Norman Baker MP*. In that case the Tribunal recognised that when considering the disclosure of

personal data a distinction can be drawn between information relating to public and private lives. The Tribunal found that, when assessing fair processing, the interests of the data subjects are no longer paramount considerations, so far as “public officials are concerned where the purposes for which the data are processed arise through the performance of a public function”.

27. The Tribunal went on to say that the interests of the data subjects are still important, but where those individuals “carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives” (paragraph 78).
28. The Commissioner accepts that the principal data subjects are (or were) relatively senior members of staff and that the requested information relates to the execution of their work roles. However, following his examination of the material, he is satisfied that they would have a reasonable expectation that the requested information would not be released and that disclosure would be unfair. The Commissioner recognises that even among senior members of staff there would be a high expectation of privacy between employee and their employer in respect of disciplinary matters. In this case the nature of the information is such that disclosure would represent a significant invasion of their privacy and could reasonably be characterised as unfair. The Commissioner agrees with the college that disclosure would result in damage and distress to these data subjects.
29. The Commissioner accepts that the requested information relates primarily to persons who were the focus of complaints and allegations. However, there are other individuals who could be identified from the information if it was disclosed; these are those persons who made the complaints and allegations and those who provided witness evidence to the investigatory panels. The Commissioner has considered whether disclosure of the information would be unfair to these individuals. He accepts that their names could be redacted prior to any disclosure, but such redaction would not necessarily be sufficient to prevent their identity being revealed. The nature of the complaints and allegations suggest or indicate the working relationships of these persons to the principal data subjects and consequently it would be possible to identify them.
30. The Commissioner considers that these individuals had a reasonable expectation that their complaints, allegations and witness statements would not be publicised other than to the investigatory panels. Consequently the Commissioner believes that disclosure of the requested information would be unfair to these persons.
31. The Commissioner has also considered paragraph 6 in Schedule 2 of the DPA in determining whether or not disclosure would be fair. Paragraph 6 of Schedule 2 is one of the conditions for processing personal data. It can be satisfied where processing...

“is necessary for the purpose of legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the

processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.

32. In its decision in *‘House of Commons v the Information Commissioner and Norman Baker MP’*, the Information Tribunal suggested that the ‘application of paragraph 6 of Schedule 2 of the DPA involves a balance between competing interests broadly comparable, although not identical, to the balance that applies under the public interest test for qualified exemptions’ (paragraph 90). In order to satisfy the sixth condition, and therefore the second limb of the first data protection principle, the arguments in favour of disclosure must outweigh those in favour of preserving privacy and the interests of the data subjects.
33. The Commissioner accepts that there is a legitimate public interest in knowing whether the college carried out its investigations in accordance with its agreed procedures. This argument would have particular weight if there was a concern and/or evidence to suggest that such procedures had not been followed. The Commissioner is not aware of any such concern or evidence to this effect in this case.
34. The public also has a legitimate interest in accessing information that would help to explain the basis for the decisions taken in respect of the investigations it had carried out. The college has stated that the policies and procedures for investigating allegations against staff would be released to any person that made a request for them. This information would to some extent assist the public in better understanding how complaints are investigated. However the Commissioner accepts that the requested information would provide a fuller explanation of the basis for decisions made in specific cases. Whilst the Commissioner believes this to be a significant argument, it is important to recognise that the college appears to have investigated the allegations in line with its own procedures and in doing so examined the evidence offered in support of the allegations and that offered in rebuttal.
35. On balance the Commissioner does not consider the legitimate interests of the public in accessing the requested information, are sufficient to outweigh the principal data subject’s right to privacy, particularly given the level of detriment to them if the information was released. The Commissioner accepts that the disclosure of this information would constitute a significant invasion of their privacy and may have harmful effects in terms of their current or future employment.
36. The Commissioner therefore finds that section 40(2) of the Act is engaged by virtue of section 40(3)(a)(i), as disclosure would be unfair, breaching the first data protection principle.

The Decision

37. The Commissioner's decision is that the public authority breached section 17(1)(b) of the Act. It did this by failing to specify the correct exemption in its refusal notice. However the Commissioner is satisfied that the college was not obliged to supply the requested information in accordance with section 1(1)(b) of the Act by virtue of section 40(2). He is further satisfied that subsection 3(a)(i) of section 40 applied: disclosure of the requested information would breach the first data protection principle.

Steps Required

38. The Commissioner requires no steps to be taken.

Right of Appeal

39. 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 29th day of May 2008

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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 17(1) provides that –

“A public authority which ... 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 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 9Reference: FS50104995

(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.”

Data Protection Act 1998

Schedule 1

The first principle states that:

“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”.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data:

- “1. The data subject has given his consent to the processing.
2. The processing is necessary-
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary-
 - (a) for the administration of justice,

- (b) for the exercise of any functions conferred on any person by or under any enactment, 10Reference: FS50104995
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
- (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.”