

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 March 2008

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

Summary

- 1 The complainant requested information from Doncaster College concerning reports of its investigation of allegations made against its former principal. The college refused this request under section 40(2) of the Freedom of Information Act 2000. The Commissioner considers that the requested information is the personal data of the former principal and of other data subjects and that disclosure would breach the first data protection principle. The Commissioner therefore finds section 40(2) has been applied correctly to the majority of the requested information. The Commissioner has concluded that the college incorrectly relied on section 40(2) in respect of the details of Mr Gates' severance payment. He therefore requires this information to be provided to the complainant.

The Commissioner's Role

2. The Commissioner's role 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

3. On 27 April 2007 the complainant made the following request to Doncaster College (the college):

'Please provide the information Doncaster College holds on the investigation into its principal David Gates, including any reports drawn up during the inquiry or at its conclusion'.

4. The college wrote to the complainant on 25 May 2007 asking him to be more specific in identifying the information he required.
5. The complainant wrote back to the college on 25 May 2007. He complained about the time taken by the college to respond to his request and about the nature of its response. The complainant asked the college to clarify whether any reports were drawn up as part of the disciplinary process involving the former principal.
6. On 25 May 2007 the college wrote to the complainant to confirm that 'reports do exist in connection with this matter'.
7. On 7 June 2007 the college issued a Refusal Notice to the complainant. This stated: '*... Doncaster College is not obliged to supply any reports that may or may not have been drawn up as part of the disciplinary process, as any such reports are or would be exempt under Section 40(2) of the Freedom of Information Act.*' The college added that disclosure of the requested information would contravene the data protection principles and that disclosure would likely cause damage or distress to the data subjects.
8. The complainant wrote to the college on 7 June 2007 asking it to carry out an Internal Review of its decision.
9. The college concluded the Internal Review on 21 June 2007. It upheld its decision to withhold the requested information, citing section 40(2) of the Act.

The Investigation

Scope of the case

10. On 22 June 2007 the complainant contacted the Commissioner to complain about the failure of the college to comply with his request within the 20 working day limit and to provide the information.

Chronology

11. 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.
12. 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. 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 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 former principal (together with witnesses and other parties). He has not consented to any disclosure and if this was to occur it would result in substantial and unwarranted damage and distress, potentially damaging to his reputation and future employment prospects.

13. Contained within the documents supplied by the college is a compromise agreement between Doncaster College and David Gates. Clause 15 of this agreement is:

'Both parties agree not to make any public announcement concerning the termination of the employment except in the terms of the announcement already made and the further announcement in the agreed form attached as a Schedule to this Agreement'.

14. On 29 August 2007 the Commissioner telephoned the college to make further enquiries. These concerned the disciplinary procedures it had followed, the release of the statement referred to in the compromise agreement (the press release) and the payment it had made to the former principal on the termination of his employment.
15. The college confirmed that the press release was not sent out proactively; rather it was circulated to those who made requests for it. It also confirmed that the press release was sent by email to all members of the college staff. To illustrate this policy, the college sent the Commissioner copies of the emails containing the press release which it had sent to Radio Sheffield, Doncaster Free press and Doncaster Star.
16. To show that it had followed its agreed policies for dealing with this type of disciplinary matter, 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

17. In answer to the Commissioner's questions concerning the payment made to Mr Gates on the termination of his employment, the college referred to the Learning and Skills Council's Guidance for Colleges on the Production of Accounts. Paragraph 5.70 relates to 'Severance Payments' and states:

5.70 *'Colleges are required to disclose the amount of severance costs for each year and state whether these were approved by the corporation or a committee established by the corporation for this purpose.'*

The college assured the Commissioner that the severance payment made to Mr Gates would be published in accordance with the Learning Skills Council's (LSC) guidance and this publication would take place in December 2007. The accounts containing these details are a matter of public record and will be available on request and placed in the college and other public libraries

Analysis

Section 40

18. 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.
19. 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.
20. The college argues that the requested information constitutes the personal data of its former principal, and also of a number of other individuals, including the witnesses, the Chair of Governors, the members of the Special Committee, the Investigating Officer and of an Advisor.
21. The information requested by the complainant can be summarised as the details of allegations made against Mr Gates and details of the disciplinary proceedings which flowed from these allegations. It relates solely to matters internal to the college and contains the minutes of the Special Committee which considered the allegations. There are two agreements entered into by the college and Mr Gates, namely a compromise agreement and a termination agreement. These contain details of the financial package offered to Mr Gates.
22. Having reviewed the information supplied by the college, the Commissioner is satisfied that all the information requested is the personal data of Mr Gates. Mr

Gates is unquestionably the focus of the information and given this fact the college has no scope to redact the information. In addition some of the information also constitutes personal data of third parties such as witnesses that gave evidence during the investigation.

The first data protection principle

23. 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.
24. The first data protection principle has two components:
 1. Personal data must be processed fairly and lawfully, and
 2. Personal data shall not be processed unless one of the conditions in the DPA schedule 2 is met.
25. The college argues that disclosure of the requested information constitutes the processing of the 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.
26. The Commissioner agrees that the relevant principle here is the first principle; the requirement that any processing should be fair and lawful.
27. In the Commissioners view, the right to access official information and the right to agree terms when an employee leaves a public authority's employment are not mutually exclusive. A balance has to be struck between the public authority's obligation to be transparent and accountable about its decisions, including the expenditure of public money, with its duty to respect its employees' reasonable expectations of privacy.
28. The Commissioner has considered the withheld information and Mr Gates' reasonable expectations about the release of that material. In this case the Commissioner considers that Mr Gates would have different expectations about the disclosure of details of the severance payment he received and the other information held in relation to the investigation into his conduct. He has therefore considered disclosure of the severance payment details separately from the analysis about the remainder of the information.
29. The Commissioner recognises that there is a widespread expectation that the details of a person's employment should be considered confidential. There is a recognised expectation that information about the internal disciplinary matters of an individual is private.
30. 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 that to disclose information about him or her acting in an official capacity would be unfair'.

31. Mr Gates was the college's most senior official and had a high public profile. It is commonly held that the employment details of similarly placed people are routinely in the public domain. This is especially so in relation to their contracts of employment and salary details. However, in this instance the majority of the information sought consists of material not usually available to the public.
32. 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 subject 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".
33. The Tribunal went on to say that the interests of the data subject 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).
34. Notwithstanding Mr Gates' seniority and that the information relates to his public life, the Commissioner is satisfied that he would have a reasonable expectation that the majority of the requested information would not be released. The Commissioner has examined the material in order to determine whether its disclosure would be unfair to Mr Gates. The Commissioner recognises that even amongst senior members of staff there would still be a high expectation of privacy between employee and his employer in respect of disciplinary matters. In this case the nature of the information is such that disclosure would represent a significant invasion of Mr Gates' privacy and could reasonably be characterised as being unfair. The Commissioner agrees with the college that disclosure would result in damage and distress to Mr Gates.
35. The Commissioner notes that the agreement between the college and Mr Gates includes a provision at clause 15 that expressly limits the amount of information that will be made available to the public about the termination of his employment. He is satisfied that this would set a reasonable expectation that no further information would be released save for the press release that was agreed between the parties.
36. In addition the Commissioner has found no evidence to suggest that Mr Gates proactively sought to put details of his departure from the college into the public domain. If he had sought to gain publicity about the termination of his employment it may have been possible to argue that he would not have a reasonable expectation that the information would remain private, however this is not the case in this instance.
37. The Commissioner is further satisfied that witnesses who gave evidence during the investigation would have a reasonable expectation that the information they provided in the context of the investigation would not be released to the general

public. Therefore disclosure of their personal data would, in the Commissioner's view, be unfair to them as well as Mr Gates.

38. 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”.
39. 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 the 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 subject.
40. The Commissioner accepts that there is a legitimate public interest in knowing whether the college carried out its investigation in accordance with its 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 such a concern or evidence to this effect in this case.
41. The public also has a legitimate interest in accessing information that would help to explain the basis for the decisions taken in respect of Mr Gates. 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, he accepts that the requested information would provide a fuller explanation of the basis for decisions made in this specific case. 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.
42. On balance the Commissioner does not consider that the legitimate interests of the public accessing the majority of the requested information are sufficient to outweigh Mr Gates' right to privacy, particularly given the substantial level of detriment if the information were released. The Commissioner accepts that the disclosure of this information would constitute a significant invasion of his privacy and may have a harmful effect on Mr Gates' future employment prospects.

The Severance Payment

43. During the course of his investigation, the college explained to the Commissioner that it intended to publish the amount of severance pay in its Accounts in December 2007. The Commissioner is required to consider whether or not the college complied with the requirements of the Act at the time that the request was received. As the college refused to supply any information at the time, the Commissioner has assumed that it was also relying upon section 40(2) in respect of the severance payments as well as all of the other information held. He notes that no other exemptions were cited specifically in relation to the severance payment such as the section 22 exemption for information intended for future publication.
44. The Commissioner accepts that the amount paid to Mr Gates is his personal data. However in his view Mr Gates should have had a reasonable expectation that details of the severance payment would be released, in contrast to the other information. As a senior post holder within the college he should have been aware of the reporting requirements and in particular the LSC guidelines for the production of accounts and the inclusion of details of severance payments.
45. The college confirmed to the Commissioner that Mr Gates had an expectation that this information would be put into the public domain when the college accounts were published. However, it appeared to draw a distinction between details of the payment being included in the accounts and the information being released under the Act. The Commissioner asked the college to identify the detriment that would be caused to Mr Gates if disclosure was made under the Act at the time of the request. The college failed to offer any arguments in this regard.
46. The Commissioner does not consider that disclosing the amount of the severance payment at the time of the request would have been unfair, particularly given that Mr Gates had an expectation that details of the severance pay he received would be put into the public domain via the accounts. He has been unable to identify any detriment to Mr Gates' privacy if this information had been released at the time of the request.
47. Although the Commissioner concluded that the legitimate interests of the public in accessing information about the investigation were not sufficient to outweigh Mr Gates' right to privacy he has not reached the same conclusion in relation to the severance pay. In this regard he considers that there is a significant legitimate interest in the public knowing the amount of public money that has been paid to Mr Gates' when terminating his employment. This information would ensure transparency and accountability on the part of the college. It would also enable the public and in particular the local community, to better understand the cost of the decision to enter into an agreement with Mr Gates. As the Commissioner has not identified any detriment that would have arisen due to disclosure prior to the accounts being published, he is satisfied that the legitimate interests of the public are sufficient to outweigh Mr Gates' right to privacy in relation to the severance payment.

The Decision

48. The Commissioner's decision is that the public authority partly dealt with the request for information in accordance with the Act. He is satisfied that the college was not obliged to supply the majority of the requested information in accordance with section 1(1)(b) by virtue of section 40(2). He is further satisfied that subsection 3(a)(i) of section 40 applied because disclosure would breach the first data protection principle. Therefore he has not specified any remedial steps in this regard.
49. However, the Commissioner has concluded that the college incorrectly relied on section 40(2) in respect of details of Mr Gates' severance payment. He does not consider that disclosure of the amount paid to Mr Gates would breach the data protection principles. In failing to supply that information to the complainant the public authority breached section 1(1)(b).

Steps Required

50. The Commissioner requires the college to take the following steps to ensure compliance with the Act:
51. To provide the complainant with details of the severance payment made to its former principal. In the Commissioner's view this could be achieved via the provision of the relevant extract from the college's accounts for 2007.
52. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

53. 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

54. 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 March 2007

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 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.”

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).”

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.”