

Freedom of Information Act 2000 (Section 50)

Decision Notice

05 March 2009

Public Authority: Wiltshire County Council
Address: County Hall
Bythesea Road
Trowbridge
BA14 8JN

Summary

The complainant requested an investigatory report relating to the disciplinary hearing of a head teacher. Wiltshire District Council ("the Council") withheld the information by applying sections 40 and 41 of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner found that section 40(2) was engaged and therefore did not go on to consider whether section 41 applied. He also noted that the Council did not specify in its refusal of the request or its internal review that it was relying on subsection 2 of section 40. It therefore breached section 17(1)(b) of the FOIA.

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 FOIA. This Notice sets out his decision.

The Request

2. On 10 January 2007, the complainant requested the investigatory report relating to the disciplinary hearing of a head teacher.
3. On 12 February 2007, the Council responded by stating it was withholding the majority of the information by applying sections 40 (personal information) and 41 (information provided in confidence) of the FOIA. In support of section 40, the Council explained it was protecting the privacy rights of individuals in accordance with the Data Protection Act 1998 ("the DPA"). In support of section 41, the Council explained that the individual who wrote the report and those whose interviews are referred to in the report all had a reasonable expectation that it would be treated in a confidential manner. The Council stated that it believed a limited amount of information in the report constituted the complainant's personal data and this was disclosed under the DPA.

4. On 20 February 2007, the complainant requested a review of the decision, to which the Council responded on 28 February 2007 upholding its original decision.

The Investigation

Scope of the case

5. On 1 March 2007, the complainant wrote to the Commissioner stating that he was unhappy that he had been refused the information he requested.
6. On 22 May 2008, the Commissioner wrote to the complainant explaining that he would consider whether the information had been correctly withheld. He asked the complainant to contact him if there were any other matters which he thought should be addressed.
7. The complainant responded on 23 May 2008 to ask the Commissioner to consider a separate request for the names of the members of the disciplinary panel. However, as the complainant now has the names of the panel members and the Council has been reminded by the Commissioner of its obligations to provide requested information within the statutory time limit or issue a valid refusal notice, the request for the names has not been considered in the Notice because this complaint was informally resolved.

Chronology

8. On 22 May 2008, the Commissioner wrote to the Council asking it to provide a copy of the report and respond to the following questions:
 - What was the purpose of the investigation and the report?
 - Whose personal data is being withheld?
 - Were individuals specifically informed how their personal information would be handled?
 - Are there any other reasons why it would be unfair to release the information?
 - Had the Council considered asking the individuals concerned for their consent to disclose their personal information?
9. On 19 June 2008, the Council provided the Commissioner with a copy of the report and explained the following:
 - The report concerns an investigation into allegations made against a head teacher.
 - The information is primarily the personal data of the head teacher.
 - No specific assurances of confidentiality were given to the individuals interviewed for the report.

- There is an assumed high degree of implicit confidentiality given the sensitive nature of disciplinary proceedings.
 - The head teacher's consent was sought by telephone, to which the response was an unequivocal refusal. Consent of other individuals was not sought as their personal data was also considered to be the head teacher's personal data.
10. Following this, the Commissioner contacted both the complainant and the Council by telephone to discuss details of the case. He asked both parties whether they knew of any information in the public domain about the report and the events leading up to it. Both parties confirmed that there was no such information.

Analysis

Procedural matters

11. In its refusal notice and internal review, the Council stated that it wished to rely on section 40 but it did not specify that it wished to rely on subsection 2 of section 40. The Commissioner considers that failure to specify the subsection relied upon when an exemption is being claimed constitutes a breach of section 17(1)(b) of the FOIA.

Exemption

Section 40

12. The Commissioner initially considered the application of section 40 (personal information) of the FOIA to withhold the report. This exemption provides that the personal data of a third party cannot be disclosed if the disclosure would breach any of the Data Protection Principles or section 10 of the DPA.
13. The Commissioner considered the report and was satisfied that it was the personal data of the head teacher. The report clearly concerns the professional conduct of an identifiable living individual (the head teacher). Having reached this conclusion, the Commissioner then considered whether disclosure of the report would contravene the first Data Protection Principle which states the following:
- “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”.
14. The Commissioner considered whether it would be fair to the head teacher to disclose the report. In doing so, he took into account the Awareness Guidance published by his office.

15. The report concerns details of a disciplinary matter handled internally by the school involved. It represents the detailed findings of a full internal investigation relating to various issues which arose during the course of the head teacher's employment at the school. The Commissioner recognises that information relating to internal disciplinary hearings carries a very strong general expectation of privacy due to its very sensitive nature and the likelihood that disclosure could cause data subjects significant distress and could also cause permanent damage to their future career prospects and general reputation.
16. With the above in mind, the Commissioner considered whether there appeared to him to be any reason why it would be fair to disclose the report in this case. He asked the Council whether the head teacher was willing to consent to disclosure but consent was refused. The Commissioner took into account that the head teacher occupies a senior public position with responsibility for spending public money and the education and welfare of young children. He noted that disclosure of the report would enable the public to understand the allegations that were made and what action was recommended following the investigation. The Commissioner also noted that the head teacher appears not to have been given any explicit assurance of confidentiality.
17. Taking all this into account, the Commissioner concluded that it would be unfair to the head teacher to release the information as he considers that their right to a private, properly conducted disciplinary process outweighs the legitimate interests of the public in understanding the allegations that were made and what action was recommended following the investigation. In view of this, disclosure would breach the first principle of the DPA. The Commissioner therefore decided that the Council was entitled to withhold the information under section 40(2). He did not therefore consider the application of section 41.

The Decision

18. By applying section 40(2) to withhold the information, the Commissioner's decision is that the Council correctly withheld the information requested on 10 January 2007.
19. The Commissioner also considers that the Council breached section 17(1)(b) of the FOIA for not specifying reliance on subsection 2 of section 40 either in its initial refusal or internal review.

Steps Required

20. The Commissioner requires no steps to be taken.

Right of Appeal

21. 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.

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 5 day of *March* 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal annex

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 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).”