

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 March 2009

Public Authority: London Borough of Camden
Address: 3-5 Cressy Road
Hampstead
London
NW3 2ND

Summary

The complainant asked the Council for information regarding any disciplinary action that he had asked to have taken against two named council officials. The Council refused to confirm or deny that it held the information sought, citing section 40(2) of the Act (personal information). The Commissioner found that the Council was excluded from its duty to respond to the request under section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i), because in responding to the request it would have had to disclose information which, if held, would constitute the personal data of named officials. The Commissioner concluded that the Council had, however, contravened section 17(1)(b) of the Act in failing to cite section 40(5)(b)(i) in its refusal notice.

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.
2. In considering this case, the Commissioner has also taken into account his dual role as regulator of the Data Protection Act 1998 (the "DPA"). As a result the approach he has adopted in this case together with his findings encompasses and reflects his remit under both pieces of legislation.

The Request

3. The complainant has been in correspondence with the Council for some time in connection with complaints that he has made about the actions of certain bailiffs

- and the council employees who managed them. On 4 January 2007 he asked the Council to initiate disciplinary proceedings against its relevant staff. Further correspondence ensued, and on 23 January 2007 the Council wrote to the complainant saying that a senior manager was carrying out a review to determine the appropriate action, which may or may not have been a disciplinary matter, and that the findings would be taken forward in accordance with its established procedures. The Council said that it did not consider it reasonable to inform the complainant of the outcome, given the duty of care that it had towards employees.
4. On 22 May 2007 the complainant made the following information request to the Council, with regard to any disciplinary hearing:

“1) Has the hearing been held?
2) May I have details of the outcome?”
 5. On 20 June 2007 the Council replied, saying that the information was exempt under section 40(2) of the Act. It said that the information requested is the personal information of members of staff and “the duty to confirm or deny does not apply if compliance with that duty would involve the disclosure of information covered by this exemption, therefore, I neither confirm nor deny that the information requested is held”.
 6. The Council said that the exemption applied because “the information requested is personal information as defined by the Data Protection Act 1998 and the release of this information would breach the first principle, which states firstly that data should be processed fairly and lawfully”. The Council explained that, when analysing fairness, it had to consider what individuals had been told about the processing of their personal data and what their reasonable expectations are in relation to that processing. It said that, in its view, “no individual officer would reasonably expect that information relating to internal disciplinary action would be disclosed to the public. The Council said that “Information in personnel records is generally subject to highly restricted access even within an organisation. Some of that information may even be subject to restricted access within a personnel or human resources department”.
 7. In considering whether it would breach the first data protection principle, the Council said that it had considered the Information Commissioner’s Guidance on releasing personal information about staff which stated that information relating to internal disciplinary matters would not normally be disclosed.
 8. The Council said that it did not consider that the disclosure of the requested information to the public at large would be fair in the circumstances of the case. It also said that the exemption in section 40(2) was absolute.
 9. On 2 July 2007 the complainant wrote to the Council, disputing its decision. He contended that at least one of the Council officials in question was a senior grade, that there was a strong public interest in the issues of how the Council controls its

bailiffs, and how the Council treats complaints to it. He said that people had the right to expect that their complaints would be investigated objectively.

10. On 18 July 2007 the Council notified the complainant that his appeal had been unsuccessful, and the exemption in section 40(2) applied, for the reasons given in its decision letter of 20 June 2007. It also said that "it did not agree that the public interest consideration in the case concerning the officers of Camden to which your application relates would be such as to outweigh the absolute exemption, for the reasons already set out within [the 20 June] reply".

The Investigation

Scope of the case

11. On 3 August 2007 the complainant contacted the Commissioner with copies of the Council's response, saying that, since at least one of the individuals concerned was a senior officer of the Council, the outcome of the disciplinary hearing was a matter of public interest.
12. After further correspondence with the Commissioner's staff in which it was explained to the complainant the role that the public interest test plays in the Act with regard to the release of personal information, on 21 August 2007 the complainant confirmed that he wished his 3 August letter to be considered as his complaint to the Commissioner.
13. The complainant also raised other issues relating to the Council and its dealings with, and supervision of, bailiffs that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
14. Legislation relevant to this complaint is set out in full in the Legal Annex to this Notice.

Chronology

15. On 18 December 2008 the Commissioner's staff contacted the Council seeking its relevant papers and comments. The Council responded on 13 January 2009.

Analysis

Procedural matters

Section 17(1) – refusal of request

16. Under section 17(1) of the Act, a public authority which is relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to a request, should 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.

17. The Council has refused to confirm or deny whether it holds the information sought by the complainant, namely the outcome of any disciplinary hearing against named officers of the Council. In doing so it has relied on the exemption in section 40(2) of the Act, and issued a refusal notice to that effect on 20 June 2007. However, the exclusion from the duty to confirm or deny in relation to personal information is derived from section 40(5) of the Act. The Commissioner therefore considers that the Council has acted in contravention of section 17(1)(b) in failing to cite section 40(5)(b)(i) in its refusal notice.

Exemption

Section 40(5)(b)(i) – Exclusion from the duty to confirm or deny

18. Under section 1(1)(a) of the Act, any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. Taking into account the nature of the request in this case, the Commissioner has therefore gone on to consider whether the public authority was excluded from the duty imposed on it by the provisions of section 1(1)(a) of the Act by virtue of the provisions of section 40(5)(b)(i).
19. From the outset, it is important to point out that the Act is applicant blind except in very limited circumstances, none of which are applicable in this case. This means that a disclosure made under the Act is, in effect, a disclosure to the world at large, as any other applicant for the same information would be entitled to it on request.
20. Generally, the provisions of sections 40(1) to 40(4) exempt 'personal data' from disclosure under the Act. Subject to certain provisions of the Data Protection Act ("the DPA"), section 40(2) exempts information that constitutes the personal data of an individual other than the applicant. In relation to a request for such third party information, section 40(5)(b)(i) excludes the public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemptions in section 33A(1) of the DPA were disregarded.
21. 'Personal data' is defined in section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.
22. The Commissioner is of the view that the matter of whether or not there have been disciplinary proceedings against particular individuals acting in their professional capacity is information which constitutes the personal data of those individuals, as it relates to identifiable living individuals. That being so, the Commissioner considers that a proper approach would be first to consider whether or not, in responding to the request, the public authority would have been

excluded from the duty to confirm or deny whether information is held imposed by section 1(1)(a) of the Act.

23. In accordance with the provisions of section 40(5)(b)(i), the Commissioner therefore considered whether or not confirming or denying whether there had been disciplinary hearings against certain named officers of the Council would contravene any of the data protection principles.

Would complying with section 1(1)(a) contravene the first data protection principle?

24. The first data protection principle states :

“personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met....”

25. The Commissioner considers that the most relevant condition for processing in this case is likely to be Schedule 2(6)(1), which states:

“the processing is necessary for the purposes 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”.

26. In considering whether or not confirming or denying that disciplinary proceedings had taken place would contravene the first data principle, the Commissioner took into account the reasonable expectations of the named council officials against whom any such proceedings would have been taken, the legitimate interests of the public and the rights and freedoms of the named officials.

27. The Commissioner is satisfied that, in the context of any disciplinary proceedings which may or may not have taken place, the named officials would have had an expectation of privacy and would not have expected the public to have access to information which discloses whether or not any such proceedings had occurred. This view is consistent with the conclusion of the Information Tribunal in the decision in the case of *Waugh v the Information Commissioner and Doncaster College* (EA/2008/0038), in paragraph 40 of which the Tribunal held that:

“There is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters. ”

28. The Commissioner considers that the public has a legitimate interest in knowing that the actions of officials are monitored. As stated in paragraph 2 above, in its letter of 23 January 2007 to the complainant following his complaint about the named officials, the Council said that a senior manager was carrying out a review to determine the appropriate action, which may or may not have been a disciplinary matter, and that the findings would be taken forward in accordance with its established procedures. The Commissioner considers that the public

interest is satisfied by knowing that the Council has complaints mechanisms in place to ensure that standards are maintained, rather than knowing whether or not disciplinary proceedings were taken against specific officials.

29. Further, the Commissioner is satisfied that disclosing whether or not named officers were the subject of disciplinary proceedings would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the officials in question. He therefore concludes that the prejudice to the individuals' right to privacy outweighs the legitimate interests of the public in accessing this information.
30. The Commissioner is, therefore, satisfied that, if the Council were to comply with section 1(1)(a) of the Act by providing any information as to whether or not it had undertaken disciplinary proceedings, it would contravene the fairness element of the first data principle. As the Commissioner is satisfied that complying with section 1(1)(a) would contravene the first data protection principle, he has not gone on to consider the other data protection principles.
31. The Commissioner, therefore, finds that the Council is not obliged to inform the complainant whether or not it holds details of the outcome of any disciplinary proceedings it may have taken, by virtue of the provisions of section 40(5)(b)(i) of the Act.

The Decision

32. The Commissioner's decision is that the Council acted correctly in refusing to confirm or deny whether it held the information sought by the complainant. However, the Council contravened the requirements of section 17(1)(b) in not citing section 40(5)(b)(i) in its refusal notice.

Steps Required

33. The Commissioner requires no steps to be taken.

Right of Appeal

34. 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 3rd day of March 2009

Signed

**Gerrard Tracey
Assistant 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(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(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”.”

Refusal of Request

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.”

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)."

The Data Protection Act 1998

Schedule 1- the Data Protection Principles

1. "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."