

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 September 2009

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool
L2 2DH

Summary

The complainant requested information from Liverpool City Council regarding the departure of Robyn Archer. The Council refused to disclose the requested information under sections 40(2), 41 and 43 of the Act. The Commissioner has investigated and found that the Council breached the requirements of sections 1(1), 17(1) and 10(1) of the Act. However, he found that the requested information is exempt by virtue of section 40(2) of the Act.

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. The complainant made the following request for information to Liverpool City Council (the "Council") on 8 August 2007:

"1. All internal council documentation (including emails) which relates to the departure of Robyn Archer as the artistic director of the city of culture project. Some of this documentation will predate her actual departure some of it may have been generated since.

2. All correspondence (including emails) with Robyn Archer and or her representatives which concerns the departure of Robyn Archer as artistic director of the city of culture. Some of this correspondence will predate her

actual departure; some of it may have been generated since. I am interested in receiving both sides of the correspondence.

3. A list of all payments made to Robyn Archer and or her representatives which have been made since announcing her departure as artistic director.

3. The complainant received a response from the Liverpool Culture Company on 22 November 2007 which stated that the Liverpool Culture Company Limited is not subject to the Act as it is not a public body. However, it explained that it does try to respond to requests within the spirit of the legislation and as such explained that the information requested was exempt from disclosure by virtue of sections 40, 41 and 43 of the Act.
4. The complainant requested a review of this decision on 22 November 2007 stating that his original request was sent to the Council and not to the Liverpool Culture Company as he was seeking the information held by the Council. The complainant stated that he believes the Council does hold information and asked that a review be undertaken of the handling of this request.
5. The Council responded on 3 January 2008 explaining that it was not in a position to answer requests on behalf of other organisations such as the Liverpool Culture Company. It explained that any requests received by it are recorded in a database and referred electronically to Liverpool Culture Company for them to respond direct. The Council stated that it was for the Liverpool Culture Company to respond on the issue further.

The Investigation

Scope of the case

6. On 24 January 2008 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:
 - The Council's failure to respond to the request on time.
 - The information request was made to the Council and not to the Liverpool Culture Company.

Chronology

7. The Council telephoned the Commissioner on 27 February 2008 stating that it would write to the Commissioner explaining why the Council holds no information in relation to the complainant's request as all the information is held by the Liverpool Culture Company.
8. Having received no response the Commissioner wrote to the Council on 25 July 2008 asking that an explanation now be sent explaining why the Council holds no information.

9. The Council responded on 31 July 2008 enclosing a copy of the letter it had sent on 27 February 2008 to the complainant. The letter of 27 February 2008 explaining that as the request related to Robyn Archer who was employed as the Liverpool Culture Companies Artistic Director it had referred the request to them as they are a separate organisation. The Council stated that it had not refused the request as this was done directly by the Liverpool Culture Company.
10. The Commissioner telephoned the Council on 21 August 2008, he explained that he understood the difference between the Council and the Liverpool Culture Company and also that the complainant understood this difference but had specified that his request was for information held by the Council. The Commissioner asked the Council to clarify if the request had ever been processed as a request to the Council and appropriate checks made. The Council confirmed that it had not dealt with the request. The Commissioner asked the Council what information it holds falling within the scope of the request, the Council agreed that in theory it may hold information which related to the departure of Robyn Archer and that in light of this the request needed to be looked at again. The Council agreed to search for any information falling within the scope of the request.
11. The Commissioner wrote to the Council on the same day asking it to:
 - Detail whether the Council has identified any recorded information relevant to the request;
 - Describe the actions taken by the Council to establish whether information is held, with reference to which departments were involved and the process involved in extracting relevant information, i.e. describe how it satisfied itself that it has identified all relevant information;
 - Indicate whether the Council intends to apply any exemptions to the information and specify which exemption of the Act applies and why
 - Provide the Commissioner with a copy of any information held.
12. The Council responded on 4 December 2008 confirming that it did hold information falling within the scope of the request. The Council identified information following searches of the Chief Executives Office, Legal Services and Liverpool Direct Ltd. The Council explained that it considered this information to be exempt by virtue of sections 40, 43 and 41 of the Act.

Findings of fact

13. The Council hold information falling within the scope of the request. This information consists of: a consultancy agreement, internal correspondence within the Council, correspondence with Robyn Archer, correspondence between the Liverpool Culture Company and Robyn Archer and the Settlement Agreement. As set out above, the Council state that all of this information is exempt by virtue of section 40(2), 41(1) and 43(2). All of this information is linked to the settlement agreement and the Commissioner has given consideration to all of the withheld information.

Analysis

Procedural matters

14. Section 1(1) provides that any person making a request for information to a public authority is entitled to (a) be informed in writing by the public authority whether it holds information of the description specified and (b) if that is the case to have that information communicated to him.
15. Section 17(1) provides that a public authority which is relying on a claim that the information is exempt information must within the time for compliance with section 1(1) give the applicant a notice which (a) states the fact, (b) specifies the exemption in question and (c) states why the exemption applies.
16. Section 10(1) states that a public authority must comply with section 1(1) no later than the twentieth working day following the date of receipt.
17. The Council failed to respond to the complainant's request. The refusal notice of 22 November 2007 was not issued by the Council but was issued by the Liverpool Culture Company as the Council had incorrectly referred the request to it. At the internal review the Council failed to comply with section 1(1)(a) and did not inform the complainant whether or not it held information but stated that the request had been referred to Liverpool Culture Company as they were most likely to hold information.
18. By failing to inform the complainant whether or not it holds information the Council breached the requirements of section 1(1)(a), further by failing to issue a refusal notice within the time for compliance the Council breached the requirements of 17(1) and 10(1) of the Act.

Exemption

19. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act ("the DPA").
20. In order to rely on the exemption provided by section 40(2), 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 of the individual”.

21. Having considered all of the information held by the Council the Commissioner is satisfied that all of the withheld information constitutes the personal data of Robyn Archer as defined under the DPA.
22. The Commissioner has therefore gone on to consider if disclosure of the information would breach the requirements of the first data protection principle. The first data protection principle has two components:
 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
 2. at least one of the conditions in DPA Schedule 2 is met.
23. The Commissioner considers that the relevant condition in schedule 2 is the sixth condition. This states that personal data may be processed for the purposes of legitimate interests pursued by the data controller or by the third parties to whom the data are disclosed unless the processing would prejudice the rights and freedoms or legitimate interests of the data subject. The Commissioner considers that the third party whose legitimate interests must be considered is the general public rather than the complainant.

Would disclosure of the information be fair?

24. In considering whether disclosure of the individual's personal data would contravene the first data protection principle the Commissioner will firstly consider whether disclosure of the information would be fair. In considering this, he will take into account the reasonable expectations of the data subject and balance this against the legitimate interests of the public in knowing the circumstances regarding her departure.
25. In considering whether the disclosure of the information would be fair, the Commissioner will consider whether the data subject would have an expectation that their information would be processed in a particular way, whether because it would be reasonably obvious that would be the case, or because the data processor (i.e. in this case the Council) told the individual that their information would be processed in that way at the time that the information was obtained.
26. The Commissioner notes that section 7 of the settlement agreement contains a confidentiality clause which is binding on both parties, and although they do not specify an agreed position in the event of a request under the Act the Commissioner considers that it could be read widely enough to cover disclosure of the information requested.
27. The Commissioner believes that the right to access official information and the right to reach equitable and mutually agreed settlements in private are not

mutually exclusive. However, the Commissioner also believes that where parties reach a settlement a balance has to be struck between a public authority's duty to be transparent and accountable about how and why it decided to spend public money and its duty to respect its employees' reasonable expectations of privacy. In the Information Tribunal decision EA/2008/0038 *Waugh v Doncaster College* the settlement agreement in place also included a confidentiality agreement which limited the information that would be made available to the public. The Tribunal held that this gave rise to "a reasonable expectation that no further information would be released" and that "even in the public sector compromise agreements may be expected to be accorded a degree of privacy as long as there is no evidence of wrongdoing or criminal activity present." The Commissioner is satisfied that it was reasonable for the data subject to expect that information relating to her departure would remain private.

Legitimate Interests

28. The Commissioner must carry out a balancing exercise to decide whether the legitimate interests of the public in knowing the circumstances of the departure of Robyn Archer outweighs her legitimate interests. Consideration of the legitimate interests of the public can often inform whether the disclosure is fair. The Commissioner normally considers the following three factors:

1. There must be a legitimate public interest in disclosure
2. The disclosure must be necessary to meet that public interest; and
3. The disclosure must not cause unwarranted harm to the interests of the individual.

29. The Commissioner has identified the following legitimate public interest:

- transparency / accountability
- spending public money
- seniority of data subject

He also notes that disclosure would meet these legitimate interests.

30. The Commissioner has made it clear in his guidance on the application of section 40 that the seniority of officials should be taken into account when personal data about them is being requested under the Act. The Commissioner indeed considers that the more senior a person is the less likely it will be that disclosure of information about them acting in an official capacity would be unfair.

31. However the circumstances of this case require that this should also be weighed against the legitimate interests of a senior employee who has reached a confidential settlement and therefore has a reasonable expectation that their personal data would not be subsequently disclosed.

32. Whilst the Commissioner notes that the data subject was responsible for the spending of public money and the holder of a very senior position the Commissioner does not consider that the legitimate interests of the public in accessing the requested information are sufficient to outweigh the data subject's

right to privacy, particularly given the substantial detriment that would result from disclosure.

33. In the circumstances of this case the Commissioner finds that disclosure would contravene the first data protection principle. The Commissioner considers that the legitimate rights of the data subject outweigh the legitimate interests of the third party and that release of the requested information would be unfair. The information is therefore exempt under section 40(2) of the Act.
34. The Commissioner has not gone onto consider the application of the other exemptions as he has decided that all of the information is exempt under section 40(2).

The Decision

35. 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:

The application of section 40(2) to withhold the requested information.

36. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

The public authority breached the requirements of sections 1(1)(a), 10(1) and 17(1) of the Act. The Council also breached section 17(1)(b) as it failed to specify the exemption being claimed down to the subsection.

Steps Required

37. The Commissioner requires no steps to be taken.

Right of Appeal

38. 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 9th day of September 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(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”.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

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.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

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) the 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.