

Freedom of Information Act 2000 (Section 50)

Decision Notice

19 May 2009

Public Authority: Magherafelt District Council
Address: Council Offices
50 Ballyronan Road
Magherafelt
BT45 6EN

Summary

On 22 February 2008 the complainant requested information from Magherafelt District Council ('The Council') in relation to disciplinary action taken against members of The Council staff and the statistics involved. The complainant asked that the information cover the previous three year period. The complainant made it clear in his request that personal information about any individual was not required. The Council provided some information but withheld the remainder of the information relating to the discipline itself and reasons for dismissal, on the basis that it is exempt under section 40(2) of the Freedom of Information Act 2000 ('the Act') and contended that given the small number of staff involved, it may be possible to identify those individuals. The Council applied section 38 of the Act at the internal review stage holding the view that disclosure would be likely to endanger the physical or mental health of the individuals concerned.

The Commissioner finds that the Council have not dealt with the complainant's request in accordance with section 17(1) of the Act in that the refusal notice did not specify the subsection of section 40 to be relied upon. The refusal notice also failed to mention the application of section 38 and the public interest arguments which was not applied until the review stage. As the Council failed to provide the information to the complainant which he was entitled to by the end of the internal review stage the Commissioner finds the Council in breach of s.1 (1) (b) of the Act. As it failed to supply this information within the statutory time limit of 20 working days the Commissioner also finds the Council in breach of s.10 (1) of the Act.

The Commissioner has instructed the Council to release to the complainant the summarised schedule of information as instructed in his decision at paragraph 65 below.

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 Act. This Notice sets out his decision in respect of the complainant's request.

The Request

2. On 22 February 2008 the complainant emailed the Council to request information as follows:

'How many members of council staff have been disciplined in the last three years?

Give details of the discipline.

How many members of council staff have been suspended from their posts in the last three years?

List the reasons why the person was suspended.

How many members of staff have been dismissed from their posts in the last three years?

Give reasons why the person was dismissed.

Personal information about any individual is not required.'

3. On 19 March 2008 the Council emailed the complainant with its decision in relation to the request. They decided to release some of the information as follows.

'1. 15 members of staff, currently employed, were disciplined during the period 1st April 2003 - 31st March 2007.

2. No members of staff were suspended during the above period.

3. 3 members were dismissed.'

However, the Council refused to disclose details of the discipline and reasons for dismissal relying upon section 40 of the Act and argued that given the small number of staff involved in the council it may be possible to identify those individuals. The Council also stated to the complainant that no members of staff were suspended therefore no reasons for suspension were given.

4. On 19 March 2008 the complainant made a request via email for an internal review of the council's decision not to reveal the reasons why members of staff were disciplined or dismissed.
5. The Council reviewed their initial decision and incorporated their internal review decision into a letter to the complainant on 16 April 2008. Their decision was to uphold their refusal to disclose by

- application of the exemption at section 40(2). The Council provided no analysis or reasoning of the DPA in this review. It was this piece of correspondence which first mentioned the Council's reliance upon the exemption in section 38.
6. On 5 June 2008 the complainant wrote to The Commissioner stating that he had not received a decision regarding the internal review which he requested on 19 March 2008.
 7. The Commissioner wrote to the Council on 8 July 2008 advising them of the guidance issued regarding time limits on carrying out internal reviews (Good Practice Guidance 5).
 8. The Council wrote to the complainant on 24 July 2008 after reviewing the correspondence in the case and outlined the following:
 1. The complainant sought a review by email on 19 March 2008;
 2. The Council forwarded a refusal notice to the complainant on 16 April 2008;
 3. The complainant sent an email to The Council on 27 May 2008 to indicate that he had not received a reply to his request for an internal review;
 4. The Council sent an email to the complainant on 29 May 2008 which advised that it had replied on 16 April by email and first class post and;
 5. The Council resent a copy of the internal review decision on 29 May 2008.
 9. Enclosed in the correspondence of 24 July 2008 the Council sent the complainant a further copy of the internal review decision.
 10. The Commissioner concludes that the internal complaints procedure has been exhausted and has therefore considered the complaint to the Commissioner as an application under section 50 of the Act.

The Investigation

11. The complainant wrote to the Commissioner on 5 June 2008. It was unclear whether the complainant had gone through the internal review with the Council. Both the complainant and the Council confirmed to the Commissioner that an internal review was carried out in this case. The Commissioner therefore proceeded to an investigation of this case. The complainant confirmed to the Commissioner that he was satisfied with the time period considered by the Council in relation to his request (i.e. the staff discipline information held for the period 01/04/2004-31/03/2007).

12 On 17 October 2008 the Commissioner commenced his investigation by writing to the Council firstly clarifying that that complaint related to the nature of the information released and the exemptions applied. The Commissioner also sought copies of all the withheld information. The letter outlined a breach of section 17(1) in relation to the refusal notice and asked the Council to confirm which subsection they wished to rely upon in section 40. The Commissioner asked for clarification on the following:

1. *Why the release of the information would particularly identify individuals;*
2. *How many individuals would it identify;*
3. *Is this information otherwise in the public domain.*

13 The Commissioner also asked for further reasoning as to why a small number of individuals would be affected by the request.

The Commissioner noted that the Council had made no reference to the DPA or the Data Protection Principles and sought a detailed explanation on the following:

1. *How does the requested information fall within the definition of 'personal data' as defined in the DPA?*
2. *Why would disclosure of the requested information contravene any of the data protection principles?*

The Commissioner also asked the Council to confirm whether or not the requested information was subject to a section 10 notice.

14. On 13 November 2008 the Council provided its response and enclosed the requested information for The Commissioner's perusal in a schedule format. The correspondence clarified that the Council wished to rely upon section 40(2). Although it stated that disclosure of the information would contravene data protection principles the Council did not specify which principles or explain how disclosure would contravene them. In relation to section 10 notices the Council confirmed that the requested information was currently not subject to any section 10 notices but the Council argued that if the information was disclosed it was highly likely that various employees would lodge their section 10 notices shortly thereafter. The Council also referred to section 38 arguing that they had experience of individuals being traumatised by the publicity attaching to disciplinary action given the relatively small size of the Council and the community from which those employees come from.

15. On examining this correspondence The Commissioner asked the Council to consider release of some of this information. The Commissioner, having considered the Council's arguments, put forward his preliminary view that some of this information was not exempt.

16. On the 03 December the Council contacted the Commissioner making further representations in this case. The Council also attached a summary version of the information as a schedule to this letter ('the summarised schedule')
17. After a telephone conversation with the Council on 12 December 2008 which further advised the Council to consider the possibility of informally resolving this case, the Council provided further submissions via letter to The Commissioner on 16 December 2008 confirming that no further disclosure would be made to the complainant.
18. The Commissioner emailed the Council on 17 December 2008 acknowledging receipt of the correspondence and informed The Council that The Commissioner would now proceed to a Decision Notice.

Analysis

Procedural matters

Refusal Notice

19. Where a public authority refuses a request for information it is required under section 17 of the Act to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon.
20. In addition, where the public authority is seeking to rely on a qualified exemption (one subject to the public interest test) it must provide details of the public interest arguments considered for and against disclosure of the requested information. The authority must also explain the balance of these competing arguments.
21. As required under section 17(1), the Council's refusal notice of 19 March 2008 did identify the exemption under section 40 as applying to the withheld information. However, the Council failed to include the relevant subsection of the section 40 exemption. The Commissioner also notes that The Council did not provide sufficient detail on the application of the exemption to the withheld information i.e. there was no mention of the DPA or the relevance of the Data Protection Principles.
22. In light of the above, the Commissioner finds that the Council failed to provide the complainant with an adequate refusal notice. Therefore the Commissioner concludes that the Council failed to comply with section 17(1) (b) of the Act in failing to state which subsection of the exemption applied to this information. The Commissioner also finds that the Council failed to adequately explain why section 40 (2) of the Act

applied and therefore he considers the Council to be in breach of section 17(1) (c) of the Act. The Commissioner also finds that as the Council sought to apply section 38 of the Act at the internal review stage, it is in breach of section 17 (1) of the Act by failing to inform the applicant of its grounds for withholding the information within the time required as at section 10 of the Act. Also as the Council failed to provide the information, which the Commissioner finds that the complainant was entitled to within the statutory time limit they are in breach of section 10 (1) of the Act.

Section 40(2): 'Personal Data'

23 Under section 40(2) information will be exempt if it constitutes the personal data of someone other than the person making the request and its disclosure would contravene any of the data protection principles set out in schedule 1 of the Data Protection Act 1998. This is an absolute exemption which means there is no requirement to consider the public interest test.

24 In order to rely on this exemption the Commissioner must first determine if the withheld information is the personal data of any third party.

25 The Data Protection Act 1998 (DPA) defines personal information 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.'

26 The original withheld information ('the original schedule') is over a three year period from April 2006 to March 2007 and contains details of the individuals subject to disciplinary action, the exact date of the action, their departments, the penalties and the reasons for the disciplinary.

27 The Council provided a summarised schedule ('the summarised schedule') of information which contains details of the penalties the reasons why disciplinary action was taken. Details of the employee, the department, the exact date and specific details of the reasons have been removed.

Is the requested information personal data?

28. The Commissioner has firstly considered whether the original schedule and the contents of the disciplinary details constitute personal data.

The complainant was clear from the beginning of his request that personal information about any individual was not required.

- 29 The Commissioner was mindful of the fact that there are approximately 39,500 residents within the Magherafelt District, and that there are also a number of local towns nearby. The Commissioner is aware that there is no requirement for staff to reside within the Council district. The Commissioner also notes that the disciplinary action is over a 3 year period up until March 2007, being some time ago as at the time of drafting.
- 30 The Council however, believes that the fact that there are 39,500 residents within the District is irrelevant as they do not all work for the Council. The Council in their correspondence dated 03 December 2008 highlight a number of key points from within the DPA.
- *Living individuals - all the individuals who are the data subjects are alive;*
 - *Living individuals who can be identified from those data - all individuals can be identified from the data as within the population of existing and prior Magherafelt District Council employees the nature of the disciplinary offence is easily identifiable to a very small number of individuals (in some cases the offence could only have been committed by a single employee) who would be well known to the Council workforce generally and specifically to the workforce within the department within which the data subject works.*
- 31 The Council also argued that at a minimum, the Council can distinguish the data subject from other individuals from the data or the data and other information in the possession of the Council. The Council have made extensive representations regarding the identifiability of individuals in this information given the small catchments of workers employed by the Council. The Council also consider that the release of such information would cause unwarranted harm where individuals involved in the disciplinary process have a legitimate expectation of confidentiality.
- 32 The Commissioner is satisfied that the information within the original schedule taken in its totality is personal data from which an individual can be identified. The Commissioner considers that individuals can be identified clearly as linking their job title, gender and location of where they work, their department, the penalty received and the reason why they were disciplined are strong indicators of identification.
- 33 The Commissioner then proceeded to consider section 40 (2) of the FOIA which sets out an exemption in relation to personal information protected by the Data Protection Act if one of the conditions of section 40 (3) or section 40 (4) of FOIA is met. The Commissioner considered whether disclosure of the information contained in the original schedule

would breach the Data Protection Act and specifically one of the principles in schedule 1 of the DPA. The Commissioner began by considering the first principle which states:

“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.”

- 34 In considering whether it is fair to disclose the personal information contained within the original schedule the Commissioner had regard to the data subjects in this case, i.e. those employees who could be identified from within the original schedule of information. The Commissioner considers that some of those employees are likely to be junior members of staff who do not perform public facing roles. The Commissioner has noted that the Council's representations made in their correspondence of the 03 December 2008, maintain that such disclosure may cause unnecessary and unjustified distress to data subjects; and would be incompatible that the data subjects' reasonable expectation that the information would not be disclosed to others.
- 35 The Commissioner also considers that it would be unfair to workers to release information about disciplinary action taken against them in the course of their employment with the Council. The Commissioner therefore considers that it would be unfair to those data subjects to release this information and considers that the exemption at section 40 (2) of the Act is engaged in this case. The Commissioner therefore considered the Summarised Schedule.

The summarised schedule

- 36 In their correspondence of the 03 December 2008 the Council indicated that they would be willing to consider releasing a prepared and summarised schedule of information which effectively summarised the requested information. The Council later withdrew from this position and stated in their letter of the 16 December that they were of the view that no further disclosure should be made to the complainant. The Council drew to the Commissioner's attention the case of Common Services Agency (Appellants) v Scottish Information Commissioner (Respondent) (Scotland) Session 2007-08 (2008) UKHL 47 ('CSA case'). The case raised interesting and important questions as to the precise meaning of "personal data" in terms of the DPA and as to the interaction of the DPA and the Freedom of Information (Scotland) Act 2002 ("FOISA"). Primarily this was the extent of a Scottish public authority's duty under the FOISA to provide information requested in a different form to that in which it is held. The Council took the view that the information even in anonymised form does constitute personal data as it does deal with the issue of offences and punishment. The

Commissioner considered this case as well as the Council's other representations in regard to the exemption at section 40 (2) of the Act.

Section 40 (2)

37. The Commissioner considered whether the exemption was engaged in regard to the summarised information in this case. In order to engage the exemption the information in question must be personal data. The Commissioner considered the definition of personal data as at paragraph 25 above as well as the definition of sensitive personal data at section 2 of the DPA¹. The Council have contended that information about staff discipline is sensitive personal data. The Commissioner considers that staff discipline will not always be sensitive within the meaning of section 2 of the Act.
38. Having viewed the Summarised Schedule the Commissioner is satisfied that the information does not fall within the definition of personal data or indeed sensitive personal data as individuals cannot be identified from the information. The Commissioner considers that the Council in moving from their position of being willing to consider disclosing the summarised schedule to withholding it on the basis of the CSA case, did so on a misunderstanding of the legal effect and outcome of the judgement in that case. The Commissioner does not accept that where a public authority holds information to identify living individuals from the anonymised data, that this in itself turns the anonymised data into personal data. The Commissioner draws support for this approach from the CSA judgement. The Commissioner considers that if a member of the general public could identify individuals by cross referencing the anonymised data with information already reasonably available to them then the information would be personal data. Whether it is possible to identify individuals from the "anonymised data" either alone or taken in conjunction with other information is a question of fact based on the circumstances of each case. The Commissioner considers that the risk of identification here is mainly through combination with other information that might be known in an individual's locality or by work colleagues. The Commissioner has not been presented with any evidence from the Council that there is information available to members of the public which could reasonably link individuals with the information in summarised form. The Commissioner has dealt with the Council's specific arguments in relation to this case below.

¹ "In this Act 'sensitive personal data' means personal data consisting of information as to – (a) the racial or ethnic origin of the data subject, (b) his political opinions, (c) his religious beliefs or other beliefs of a similar nature, (d) whether he is a member of a trade union within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992, (e) his physical or mental health or condition, (g) the commission or alleged commission by him of any offence, or(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or sentence of any court in such proceedings"

39. The Council argue that they are the data controller and even if forced to strip personal identifiers from the data, they will still retain the original data set. Consequently they argue that it is not possible for them to anonymise the data. The Commissioner has noted that despite the argument put forward by the Council that it is not possible to anonymise the data in question the Council did provide the Commissioner with an amended list in anonymised form which removed the date, the gender, the description of the employee's job title and the department leaving only the penalty and the reason on the summarised schedule. In providing this the Council stated that if the Commissioner insisted on further disclosure the Council would be prepared to release some further information which was detailed in the amended schedule.
- 40 The Council raised specific arguments in relation to the technique called 'barnardisation' addressed in the CSA judgement. The CSA argued that barnardisation of the information requested would involve the creation of new information which it did not hold at the date of its receipt of the request, and that nothing in FOISA required it to do that. However, in the case their Lordships were unanimous in finding that barnardisation did not constitute the creation of new information but instead, rather like redaction, simply involved doing something to information to allow its release in a form which does not infringe the rights of the individuals to whom it relates. In this case the Commissioner is of the view that the process of the anonymisation of this information in this case would not constitute the creation of new information. Lord Rogers went so far as to say that where the disclosure of information requested under FOISA would breach the data protection principles, section 1(1) of the FOISA obliged an authority to consider whether it could provide that information in another form without thereby breaching the DPA. Lord Rogers did comment that such amendment or reworking of the information would be subject to the time and cost constraints which are built into the freedom of information legislation. The Commissioner relied on the dictum of Lord Hope of Craighead to support his view that truly anonymised data is not personal data and thus there is no need to consider the application of any Data Protection Act principles. Lord Hope stated "*Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection...*" (para 25).
41. The Council however, raised points in relation to the House of Lords ruling and drew the Commissioner's attention to several of the comments made obiter dictum in that case:

The Council stated that The Lords ruled that there was significant risk of indirect identification of living individuals due to the low numbers resulting from the combination of the rare diagnosis, the specified age

group and the small geographic area (the Council stress that this is the point they are consistently making concerning the small number of employees (150) employed by Magherafelt District Council). As a result the Law Lords ruled it was personal data and exempt information for the purposes of FOISA. It appears to the Commissioner that the Council have misunderstood this quote. The Commissioner questions the Council's interpretation of Lord Hope's judgement and considers the Council have taken his words out of context. The Council have misunderstood the fact that Lord Hope was paraphrasing the CSA's arguments to the requester Mr Collie in that case, and was not pronouncing judgment on the risks of indirect identification. For clarification the Commissioner has repeated the relevant section of paragraph 8 of Lord Hope judgement which states:

"But the Agency refused Mr Collie's request. He was told that the Agency did not hold these details for 2002 or 2003 as the data relating to these years was still incomplete. As for the earlier years, there was a significant risk of the indirect identification of living individuals due to the low numbers resulting from the combination of the rare diagnosis, the specified age group and the small geographic area. As a result it was personal data within the meaning of section 1 (1) of DPA and was exempt information for the purposes of FOISA 2002".

42. The Council specifically drew the Commissioner's attention to the following sentence of paragraph 7 of Lord Hope's judgement which states *"It is obvious that not all government can be completely open, and special consideration also had to be given to the release of personal information relating to individuals". "In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down"*. The Council considers that applying this sentence of Lord Hope's judgement gives support to maintaining the exemption at section 40 in this case. The Commissioner has however considered the full context of paragraph 7 which sets out that the Freedom of Information (Scotland) Act, like the Freedom of Information Act 2000, must be understood in the light of references to the Data Protection Act 1998 which implements Council Directive 95/46/EC. The Commissioner agrees with Lord Hope in this overview of the interface between the FOIA/FOISA and the DPA and considers that the Council should also have considered Lord Hope's judgement as a whole.

43. The Council also drew the Commissioner's attention to paragraphs 17 to 27 of the CSA judgement where Lord Hope dealt with 'barnardised' data and the issue of "personal data". The Council consider that Lord Hope indicated that the data controller cannot exclude personal data from the duty to comply with the data protection principles simply by editing the data so that, if the edited part were to be disclosed to a third party, the third party could not find it possible from that part alone

without the assistance of other information to identify a living individual. They consider that the definition of personal data requires account to be taken of other information which is in, or is likely to come into, the possession of the data controller. In this instance the information cannot be sufficiently anonymised for it not to be personal data and as a result the data protection principles apply. The Council also considers that the information is “sensitive personal data” as it relates to the commission of an offence and the outcome of proceedings relating to that offence. It is the duty of the data controller to comply with the data protection principles in relation to all personal data (including sensitive personal data) with respect to which he is the data controller. The Commissioner has considered this aspect of Lord Hope’s decision. At paragraph 27 Lord Hope states:

“But in my opinion the fact that the Agency has access to this information does not disable it from processing it in such a way consistently with recital 26 of the Directive, that it becomes data from which a living individual can no longer be identified. If barnardisation can achieve this, the way will be open for the information to be released in that form because it will no longer be personal data. Whether it can do this is a question of fact for the respondent on which we must make a finding.”

44. Having viewed the information the Commissioner has considered the facts of this case and summarised schedule of information. The Commissioner considers the summarised schedule to be fully anonymous even though the Council has the ability themselves to identify the individuals concerned within their own information. The Commissioner considers that the way in which the offences have been summarised would not lead to individuals being identified, for example the summarised information does not identify particular duties that the member of staff undertakes which would enable someone to work out their role. As the Commissioner is satisfied that the information is not personal data he has not considered the application of the data protection principles.
45. In forming this view the Commissioner also considered the following:
 - 45.1 The information is capable of being rendered fully anonymous and if it has it is not personal data for the purposes of the DPA and it is therefore not sensitive personal data.
 - 45.2 The Commissioner is not satisfied with the Council’s contention in their letter of the 16 December 2008 that there would be a danger of indirect identification in this case owing to the size of Magherafelt and the number of people employed by the Council. The Commissioner is satisfied that the Council employs a sufficiently large number of people for the summarised information to be rendered truly anonymous. If the Council only employed for example 10 individuals the arguments about anonymisation may take a different form. The Commissioner considers

that it is not possible to identify any individual in the summarised schedule. In any event The Commissioner has previously mentioned that Magherafelt has a population of approximately 39,500 with a number of local towns nearby and a large percentage of employees may be drawn from the local population. The Council have stated that approximately 150 people are employed by the Council. The Commissioner considers that any member of the public attempting to work out who an individual may be within the summarised schedule would not have enough information to be able to identify an individual as the information is sufficiently generic. The Commissioner considers that the information is sufficiently anonymised so that Council staff/ local residents of the greater Magherafelt area would not be able to identify which of their colleagues were disciplined unless they already had special knowledge, for example because they were involved in the disciplinary case.

- 45.3 The Commissioner is of the view that there is no issue to be taken with the time and cost constraints as the information was already easily accessible to the Council. As the Commissioner does not consider that the information is personal data in this case he has not considered the exemption at section 40 to be engaged with regards to the summarised schedule.

The impact of section 70 and section 10 notices

46. The Council has devoted a large proportion of its correspondence with the Commissioner to considering the impact of section 70 of the Act as well as the effect of section 10 notices [section 10 DPA] on the information in this case.
47. The Council stated that section 70 expressly extends the definition of data in section 1(2) of the DPA to include all information held by a public authority which does not fall within the paragraphs (a) to (d) of section 1(1) of the DPA. The Council argued that in providing a copy of the withheld information to the Commissioner the Council now effectively also has a personal data set that is within the definition of data at section 1(1) of the DPA. The Council also argued that as the information is personal data it means that the Council must have regard for section 10 notices if received. The Council makes reference to the Commissioner's guidance which recommends that they make staff aware of the request and take any objections into account. The Council consider that this is likely to lead to a large number of section 10 notices which would prevent them from releasing the information in this case.
48. The Commissioner is aware of his own guidance but considers that the Council have misunderstood the reasoning why a public authority when receiving a request under the Act has to consult with individuals or third parties. When a public authority receives a request in which information may relate to persons other than the applicant and the authority; or

disclosure of the information is likely to affect the interests of persons other than the applicant or the authority Part 1V of the Lord Chancellor's Code of Practice Issued under section 45 of the Act ('the Code') recommends to public authorities that they may wish to consult with third parties to determine whether an exemption applies or not. The Code states:

"It is highly recommended that public authorities take appropriate steps to ensure that such third parties, and those who supply public authorities with information, are aware of the public authority's duty to comply with the Freedom of Information Act, and that therefore information will have to be disclosed upon request unless an exemption applies." (Para 26).

49. The Commissioner is keen to stress that whilst the Code recommends consultation with third parties, objections raised do not constitute automatic rights of veto over the information. They are merely factors which the public authority must take into account when deciding whether an exemption is engaged or not.
50. Section 10 of the DPA.
51. Section 40 (3) (a) (ii) of the Act covers the situation where a data subject has exercised the right to object to the processing on the grounds that substantial damage or substantial distress is being caused to him by virtue of the processing (which could include disclosure). If this right has been exercised, and a notice given by a data subject under section 10 of the DPA has been accepted by the data controller, data affected by the notice would become exempt information if there was a subsequent request for access to that data from a person who was not the data subject.
52. In order for section 40 (3) (a) (ii) to be engaged the information must first be personal data (which the Commissioner contends in this case it is not), the right to object to the processing must be exercised by the data subject (which the Commissioner notes it has not). The Council must have accepted the notice under section 10 (3) of the DPA stating whether they intend to comply with the notice or not, (which the Commissioner notes has not occurred in this case.)
53. The Commissioner recognises the distinction between the recommendation to consult with third parties under the Code of practice and the right to object to processing causing substantial damage and distress. The Commissioner considers that the Council have mistakenly and inappropriately conflated the two issues

Section 38 (1)

54. The Council also invoked s. 38(1) in their review as grounds for withholding the information. The Commissioner considered the exemption at section 38 in relation to the Summarised Schedule of information. Section 38 exempts information from disclosure if its disclosure under the Act would, or would be likely to, endanger the physical or mental health of any individual, or endanger the safety of any individual.
55. The Council considered it was particularly appropriate to withhold the information because it related to disciplinary actions etc and is likely to be sensitive data.
56. The Commissioners Awareness Guidance on the s.38 exemption (available at www.ico.gov.uk) states that for the exemption to apply there must be evidence of a significant risk of endangerment to the physical or mental health or the safety of any individual. As previously mentioned, the information being withheld consists of the date of disciplinary action, the job title of the individual, the department, the penalty and the reason for the discipline.
57. The Commissioner considered whether the release of this information would or would be likely to endanger the health and safety of Council staff. If it would, then the exemption would be engaged and The Commissioner would then need to consider whether the public interest arguments are persuasive enough to justify disclosure of the information.
58. In the case of *R (on the application of Lord) v Secretary of State for the Home Office*² Mr Justice Munby expressed that, “*Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.*” In other words, the risk of endangerment need not be more likely than not, but must be substantially more than remote.
59. The Council believe that the information, if released would lead to individuals being identified and in some cases the wrong individuals identified. The Council have had experience of individuals being traumatised by the publicity attaching to disciplinary action given the relatively small size of the Council and the community from which the employees come from.
60. The Council refer to the public interest arguments in favour of upholding the exemption to include:

² *R (on the application of Alan Lord) v Secretary of State for the Home Department* [2003] EWHC 2073

1. Staff disciplined have already been subject to an appropriate procedure which does not and should not include public embarrassment;
 2. Other staff are already aware of the types of conduct that will give rise to disciplinary action;
 3. Release of such information in such circumstances would have a significantly detrimental impact on the delivery of Council services;
 4. Council could be exposed to legal action by any individual identified following the disclosure.
61. The Commissioner has considered the Council's concern about the risk of endangerment to the health and safety of staff very carefully. He has examined the particular trauma or embarrassment it considers staff may face by the local community if identified. He has considered the Council's previous experience. The Commissioner is willing to accept that release of the full schedule of information which would include include the employee's job title and department could potentially cause distress to the individuals involved if identified but even this is not enough to reach the high threshold of section 38. The Commissioner is not persuaded that there is sufficient evidence to indicate that releasing the penalty and reason details would or would likely to endanger the individuals involved either on relation to their physical or mental health or safety. The Commissioner is not satisfied with the Council's public interest arguments in the context of section 38(1).
62. Given the nature of the exempt information, the Commissioner does not accept the Council's hypothetical arguments concerning the possibility of misidentification. Having considered the nature of the information contained within the Summarised Schedule the Commissioner is satisfied that the exemption at section 38 is not engaged in this case. He has therefore not considered the public interest test in this exemption.

The Decision

63. The Commissioner's decision is that the Council did not comply with section 17 (1) (b) and section 17 (1) (c) of the act in their refusal notice to the complainant.
64. In relation to the application of the exemptions relied on by the Council the Commissioner's decision is as follows:
- The Original Schedule is exempt under section 40 of the Act.
 - The Summarised Schedule is not exempt under section 40 or section 38 of the Act.

Steps Required

65. The Commissioner requires the public authority to provide the complainant with the Summarised Schedule as attached to their correspondence of 03 December 2008 with the Commissioner within 35 calendar days of the date of this notice.

Other matters

66. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
67. The Commissioner advised the Council on at least three occasions that the information in the form of the summarised schedule including the penalty and reasons for disciplinary action should be released by way of informal resolution. The Commissioner considers that the Council have protracted his investigation of this case unnecessarily. The Commissioner noted that in correspondence to him (letter dated 03 December 2008) the Council proposed releasing the summarised schedule to the Complainant but later retracted from this position some 9 working days later (letter dated 16 December). The Council was aware that the complainant had stated in his request that he was not seeking any personal data. The Commissioner is of the view that the Council should have been receptive to the Commissioner's very strong suggestion to engage in informal resolution in this case and to have released the summarised schedule to the complainant.

Failure to comply

68. 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

69. 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@dca.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 19th day of May 2009

Signed

**David Smith
Deputy 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 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 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 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.”

Section 38(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

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.

(3) 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 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

(c) 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

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

“data” means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“personal data” means 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 intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,

- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, erasure or destruction of the information or data;

- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

Section 2 - Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

“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.”

The Data Protection Principles (Schedule 1, Part 1 DPA 1998)

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.

2 Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3 Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4 Personal data shall be accurate and, where necessary, kept up to date.

5 Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6 Personal data shall be processed in accordance with the rights of data subjects under this Act.

7 Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8 Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.