

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 August 2009

Public Authority: Eastbourne Borough Council
Address: Town Hall
Grove Road
Eastbourne
East Sussex
BN21 4UG

Summary

The complainant requested information relating to the names and addresses of people who had had enforcement notices, known as section 352 notices, issued on their properties under the public authority's policy in compliance with section 352 of the Housing Act 1985. The public authority provided some information, but withheld the names of the property-holders on the grounds that this was the personal data of third parties and therefore exempt from disclosure under section 40(2) of the Act. The Commissioner's decision is that the public authority correctly withheld the information.

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.

Background

2. The complainant believes that the public authority's actions in issuing s352 notices on houses in multiple occupation (HMO) are facilitating a fraud, whereby property-holders are persuaded to sell their freehold at a reduced price due to the issuing of the notice and its cost implications for the property-holders. He considers he has been the victim of such a fraud and is seeking to establish whether other property-holders in similar circumstances have had similar experiences.

The Request

3. On 19 June 2008 the complainant sent an email to Eastbourne Borough Council (EBC). In it, he requested the following:

“With regards to EBC’s fire upgrade policy: Please give me a list of the names and addresses of those people who had S352 notices served on them by Eastbourne Borough Council, because they connected with HMO’s that were made up of self-contained flats. I do not need details regarding HMO’s that are made up of bedsits with shared facilities.

Also please give me a list of the number of HMO’s EBC has served S352 each year, divided into whether they are HMO’s made up of self contained flats, and HMO’s that are made up of bedsits with shared facilities, starting from 1996, to the present dates. In each case please state whether the fire upgrade was triggered by a land search, or complaint, or some other reason.

The following format would be useful:

[The complainant provided a sample table format, with his suggestions as to how it should be completed.]

Also, is 9 Southcliffe, an HMO that has been served a S352 notice by EBC? Specifically, on the list of all HMO’s served S352 notices on, there is an HMO referred to as 68277 Southcliff Court 036 11/03/2003, is this the property also known as 9 Southcliff?”

4. The public authority responded on 17 July 2008, providing a list of properties in spreadsheet format in respect of the first part of the request.
5. The spreadsheet included tabulated data comprising the usage of the property, its address, a date field (understood, from the accompanying letter, to be the date of the section 352 notice) and a column labelled “how found” with the entry of either “O” (other) or “C” (complaint). For one address, [the complainant’s own address], the entry for this column read “See previous information supplied”.
6. The public authority also clarified matters relating to the address referred to by the complainant as ‘9 Southcliffe’.
7. The public authority refused to disclose information relating to the names of the persons on whom the section 352 notice were served, citing the exemption provided by section 40 of the Act.
8. The complainant requested an internal review on 23 July 2008, arguing that the public authority’s refusal to disclose the names of the property-holders was incorrect because, while he agreed that the information was personal data, disclosure under the first data protection principle would not be unfair. He also challenged the public authority’s removal of information relating to his own

address and complained that the public authority's response did not adequately explain whether the s352 notices had been served on HMOs comprising self-contained flats or bedsits.

9. The public authority conducted an internal review and wrote to the complainant on 9 October 2008. It upheld the previous decision to withhold the names of the occupiers of the properties under section 40 of the Act and also explained that the information relating to the complainant's own property had already been the subject of a previous freedom of information request made by the complainant, to which the public authority could add nothing further.
10. In relation to the complaint about the status of properties as flats or bedsits, the public authority clarified certain aspects of the spreadsheet already provided to show how that information could be obtained.

The Investigation

Scope of the case

11. On 30 November 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 point.
 - The public authority's refusal to provide the names of the occupiers of the properties under the exemption provided by section 40(2) of the Act.
12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

13. On 27 March 2009 the Commissioner wrote to the complainant, advising him that the information he had requested might be otherwise available to him via the Land Registry and suggested that as a possible alternative method of resolving his dispute.
14. The complainant replied on the same day, explaining that it was his experience that the information held by the Land Registry could differ from that held by the public authority and he wished to know the parties contacted by the public authority as this was relevant to a package of information he intended to present to Sussex Police.
15. The Commissioner was also investigating two other related cases from the complainant at this time and correspondence often contained material relevant to more than one case. This was particularly the case with responses from the complainant which sometimes overlapped with letters sent to him on other matters, or dealt with more than one case in the same response. The chronology

of the case is therefore interlinked with those cases and summarised below in broadly chronological sequence but sometimes undated, for brevity and clarity.

16. On 30 March 2009 the Commissioner wrote to EBC, requesting its arguments in respect of the withheld information
17. On 31 March 2009 and 9 April 2009 the Commissioner wrote to the complainant, asking him to provide evidence to support his view that the Land Registry data was different to that held by the public authority.
18. The complainant provided copies of documents in support of his allegations of fraud. The public authority provided a substantial volume of material, already disclosed to the complainant, which provided the Commissioner with useful background regarding the way it collected information about the names of property-holders. It was acknowledged by the public authority that the Land Registry data could be unreliable and it explained that EBC took steps to verify the names of property-holders where necessary.

Findings of fact

19. The names of property owners are held by the Land Registry. Entry on the Land Registry database is compulsory when a property is sold or mortgaged. The information held by the Land Registry on these addresses can be purchased. At the time of the Commissioner's investigation the fee, per address, was £6.
20. The Commissioner accepts that the names of property-holders registered at the Land Registry may not always be correct, for example they may be out of date for various reasons which are not relevant to this Decision Notice.

Analysis

Procedural Matters

Exemptions

Section 40

21. The Commissioner is guided by the Information Tribunal decision in *England and London Borough of Bexley*, EA/2006/0060 & 0066 at paragraphs 98-108.
22. It is not disputed that the names of the property-holders subject to a s352 notice constitute personal data. In this case, these are the names of people other than the complainant and the relevant section of the Act for consideration is section 40(2).

Section 40(2) provides that –

'Any information to which a request for information relates is also exempt information if-

it constitutes personal data which do not fall within subsection (1), and either the first or the second condition below is satisfied.'

Section 40(3) provides that –

'The first condition is-

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-

any of the data protection principles, or

section 10 of that Act (right to prevent processing likely to cause damage or distress), [...]

23. These are the relevant sections under consideration. Section 40 is reproduced in full in the legal annex to this Decision Notice.
24. The data protection principles are listed in schedule 1 to the Data Protection Act 1998, with the associated conditions listed at schedule 2. The relevant data protection principle for consideration here is the first.

'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.'

25. The schedule 2 conditions relevant for the purposes of the first principle: processing of any personal data are listed in full at the Legal Annex to this Decision Notice. The condition relevant to this Decision Notice is the sixth, discussed at paragraph 35.
26. In this case, the information does not constitute sensitive personal data, so consideration of the schedule 3 conditions is not required.
27. The complainant has argued that he is acting in the interests of the property-holders as he is attempting to uncover a fraud which he believes may also have affected them. He indicates that disclosure of the names is necessary to allow him

to contact any potential fraud victims directly, where sending letters to a more general addressee may fail to contact the correct parties, or even fall into the hands of the supposed fraudsters. He argues there may also be a wider public interest in uncovering any possible corruption within the public authority. Consequently, he maintains that disclosure of the personal data to him is neither unfair nor unlawful.

28. The Commissioner notes that the names of property owners are held by the Land Registry, that entry on the Land Registry database is compulsory when a property is sold or mortgaged and that this information is publicly available on payment of a small fee. For that reason, provision of that information cannot be made to the Land Registry in the expectation of confidentiality. To the extent that the Land Registry data correspond to the information held by EBC because the information has been derived directly from that Land Registry data, the Commissioner would not argue that there can be any expectation of confidentiality from the data subjects. Nor would disclosure be unlawful, for the same reason. There remains the consideration of whether disclosure would be fair.
29. Where, as a result of its actions to update its database, the public authority holds data which are different to those held by the Land Registry, the Commissioner has considered whether any different expectations of confidentiality should be assumed. He observes that, as similar data will be provided to the Land Registry in time, there can be no specific expectation of confidentiality where the data is provided to EBC for a similar reason, namely to establish the name of the property-holder for legal purposes. If the data had been provided to EBC for a different purpose, any expectations of confidentiality would depend on the reasons why the data had been provided. The Tribunal in *England and London Borough of Bexley*, EA/2006/0060 & 0066 is helpful at paragraph 106:

“However, the Tribunal has already referred to the Government publications on re-use of empty properties and the importance that has been placed in those public documents on obtaining the co-operation of the property owner and dealing with certain issues sensitively. It seems to us that disclosure of information without informing the owners at the time they provided the information of the potential disclosures would be contrary to that Government guidance. People’s expectations of how they are going to be dealt with would not be met. We were not told what information individuals received about the uses to which their Council Tax data would be put, but in our view it would not be fair to disclose the information in the absence of having informed the owners that that might take place as an owner might choose not to provide the information as to whether or not they are residing in the property if they knew that was going to occur.”

30. In the case under consideration in this Decision Notice, the information may have been provided to the public authority (as it was in the complainant’s case) to facilitate enforcement action against the property-holder. In those circumstances, the Commissioner considers that the information carries a greater degree of sensitivity than would be the case if it were merely provided to record the sale or purchase of a property. The same Tribunal continues at the conclusion to paragraph 106:

“Furthermore, it does not seem fair to use information obtained for one statutory purpose for another purpose unless people have been so informed in accordance with Part 2 Schedule 1 paragraph 2(3). On the basis of these two points, alone or in combination we conclude that the processing of this personal data would not be fair.”

31. The complainant's request is for information from 1996 to the date of his request in 2008, a period of 12 years. The Commissioner therefore expects that some of the names redacted from that database will no longer be relevant, the property-holders having moved or otherwise no longer be associated with the property. The corresponding issues relating to the s352 notices may also be a matter of some distant memory which some remaining property-holders may not wish to revisit.
32. The Commissioner observes that disclosure under the Freedom of Information Act constitutes disclosure to the wider world, not just to the person making the request. Consequently, it is necessary to consider the possible effect of disclosure to people who may not share the complainant's interest. These effects might include, for example, unwanted correspondence, harassment or contact, from third parties to the property-holders.
33. The Commissioner also notes a further possible consequence: that the public authority might also be subjected to similar contact, correspondence or harassment from affected property-holders.
34. For the reasons in paragraphs 29-32, above, the Commissioner considers that disclosure of the data would not be fair and the redacted information should not be disclosed.
35. The Commissioner, in common with the Tribunal in *England and London Borough of Bexley*, above, has also considered the alternative situation in which the disclosure might not have been considered to be unfair. In those circumstances, it would still be necessary to satisfy one of the conditions in schedule 2 to the Data Protection Act 1998. The relevant schedule 2 condition in the circumstances is condition 6(1).

Schedule 2 Condition 6(1)

(a) ‘The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.’

36. The Information Tribunal in the case of *The Corporate Officer of the House of Commons*, EA2006/0015 and 0016, states, at paragraph 90:

“The Tribunal finds that the application of Paragraph 6 of the DPA involves a balance between competing interests broadly comparable, but not

identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this context are members of the public (section 40 (3)(a)); and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs . However because the processing must be 'necessary' for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should the personal data be disclosed."

37. This issue was also addressed in the Information Tribunal case of *House of Commons v the Information Commissioner and Leapman, Brooke, Thomas* (EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131). The Tribunal decided that the 6th Condition created a three-part test:
 - 1). there must be legitimate interests in disclosing the information;
 - 2). the disclosure must be necessary for a legitimate interest of the public; and
 - 3). even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms & legitimate interests of the data subject.
38. The complainant has given his arguments why he has legitimate reasons for the disclosure of the information to him, summarised in the 'Background' section at paragraph 2 and at paragraph 27, above.
39. The Commissioner, while acknowledging the essential aspects of the complainant's arguments that his actions are in the public interest, argued at paragraph 27, has also considered whether the disclosure is *necessary for a legitimate interest of the public*. He accepts the principle that the uncovering of fraud would constitute a legitimate interest but has considered whether the disclosure is 'necessary' and whether this would, in any case, be defeated by the 'unwarranted interference' test set out at paragraph 37, subsection 3) above.
40. The complainant has stated his intention to present his evidence to the Sussex Police and, if this constitutes an argument for a fraud investigation, the task of gathering further evidence will fall to the police who have appropriate powers and resources for the purpose. The Commissioner does not expect that in the circumstances Sussex Police would require a private citizen to conduct evidence-gathering on their behalf and that the complainant's argument that his purpose is therefore *necessary for a legitimate interest of the public* is not sufficiently proven.
41. Additionally, for the reasons contained in the 'fairness' arguments at paragraphs 29-32 above, the Commissioner does not find that the disclosure will *'not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests'* of the property-holders.
42. Furthermore, the Commissioner notes the great lengths that the complainant has gone to in pursuit of his claims, which have their origins in 1997, and that these demonstrate a level of persistence which might not be shared by all. Because he

cannot be sure that all the property-holders would wish to be contacted by, or otherwise involved with, the complainant, or would wish to be involved in a wider investigation of possible fraud (even in their financial interest), the Commissioner finds that the disclosure would also fail the third part of the test at paragraph 36 above. This is also in accordance with the Tribunal's findings in *The Corporate Officer of the House of Commons*, EA2006/0015 and 0016, above.

43. Consequently, even if the Commissioner's arguments in relation to fairness, and its relevance to the first data protection principle, are set aside, there is no condition listed in schedule 2 of the Data Protection Act which would permit disclosure of the data.

The Decision

44. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

45. The Commissioner requires no steps to be taken.

Other matters

46. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:
47. With regard to the complainant's arguments that his request has a wider public interest purpose in exposing possible fraud or corruption, the Commissioner observes that the exemption under section 40 of the Act is an absolute exemption which does not require the public authority to conduct a public interest test.
48. One proper course of action for any suspicion of fraud would be to report it to the police. The police, apart from receiving training in such investigations, also have powers to obtain information of this nature without recourse to freedom of information legislation. The complainant has indicated his intention to provide the Sussex Police with what he describes as a 'fraud pack'. The Commissioner therefore considers that the complainant's objectives may still be achieved by providing the police with all his evidence and arguments, leaving the investigating officer to follow-up the matter of the names of the property-holders where relevant.

Right of Appeal

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 26th day of August 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

S.40 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).'*

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.'

DATA PROTECTION ACT 1998 (DPA)

SCHEDULE 1 THE DATA PROTECTION PRINCIPLES PART I THE PRINCIPLES

SCHEDULE 1 provides that –

'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.'

SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

SCHEDULE 2 provides that –

'1 The data subject has given his consent to the processing.

2 The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.'