

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 September 2009

Public Authority: Leicester City Council
Address: New Walk Centre
Welford Place
Leicester
LE1 6ZG

Summary

The complainant requested that the council provide details of the monies paid in settlement to employees of a specific division over a six month period before proceeding to a full hearing at Employment Tribunal. The council refused to disclose the information citing section 40(2) 'personal data'. The Commissioner has investigated and is satisfied that the information is personal data and that disclosure would breach the first data protection principle and section 40(2) is therefore engaged.

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 Leicester City Council (the council) on 22 October 2008:

"For the Information Services division of Leicester City Council, during each of the two quarters April / May / June 2008 and July / August / September 2008, please let me know the total amount of money paid to complainants in settlement of Employment Tribunal cases either before the full hearing or as a result of the full hearing."

3. The council responded on 22 December 2008 and stated that because of the small number of people involved releasing the information requested would breach the data protection principles under section 40.
4. On 7 January 2009 the complainant requested that the council undertake an internal review of its refusal to disclose the information under section 40 of the Act. The complainant also asked that the council explain why the request was not answered within 20 working days.
5. The council responded on 14 January 2009 providing an explanation as to why it had taken more than 20 working days to respond to the request. The council responded again on 20 February 2009 providing a full response to the internal review request. The council stated that the request could be separated into two parts:
 1. For the Information Services division during each of the two quarters the total amount of money paid to complainants in settlement of Employment Tribunal claims as a result of a full hearing; and
 2. For the Information Services division during each of the two quarters the total amount of money paid to complainants in settlement of Employment Tribunal claims before a full hearing.
6. The council stated that for part 1 there was no case involving anyone employed in the Information Services Division during the period identified, April – September, and therefore no information is held. For part 2 the council explained that only 1 person left the council on the criteria supplied before the full hearing. It stated that as the complainant was employed in that division in a senior role during that period it is likely that the complainant knows the identity of the individual. To provide the information would give details of the agreement reached, namely any sum of money, if any was involved. The council stated that this information was exempt under section 40 as disclosure would reveal the individual's personal data and would breach the data protection principles.
7. The complainant wrote to the council on 26 February 2009 asking that the council confirm that the internal review was carried out by someone other than the individual who completed the refusal.
8. The complainant wrote to the council again on 30 March 2009 having received no response to his query of 26 February 2009.

The Investigation

Scope of the case

9. On 22 April 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant stated he

was satisfied with the council's reasons for refusal of the first point of his request as this information is not held. However the complainant specifically asked the Commissioner to consider the following points:

- In relation to part 2 of his request the complainant asked the Commissioner to consider the council's refusal to disclose the requested information. In particular he stated that the council should not refuse to disclose information to him because he works for the council if they would disclose the information to others.
- The complainant asked the Commissioner to consider that the internal review was carried out by the same person who completed the refusal notice.

Chronology

10. The Commissioner began his investigation by writing to the council on 30 April 2009 requesting further arguments to support the council's refusal.
11. The council responded on 18 May 2009 providing further information to the Commissioner.

Findings of fact

12. The information being withheld by the council is the total amount paid to complainants in the Information Services division in the two quarters April / May / June and July / August / September 2008 in settlement of Employment Tribunal cases before a full hearing.
13. Only one person falls within the criteria listed in the request. The information being withheld is the amount paid to this person, if any, in settlement of an Employment Tribunal case. The council have confirmed they hold details of a settlement although it has not confirmed if any amount was paid, this is because the amount paid could be a figure of zero but would still be information held.

Analysis

Exemptions

Section 40(2)

14. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
15. One of the conditions, listed in section 40(3) (a) (i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the DPA).

- 16 The council believe that the information held is personal data, and that the release of the information would be in breach of the first principle of the DPA. Therefore it believes that section 40(2) applies.
- 17 The first principle of the DPA requires that the processing of the personal data is fair and lawful and,
 - At least one of the conditions of schedule 2 is met, and
 - In the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
- 18 In order to reach a view on the council's use of this exemption the Commissioner initially considered whether disclosure of the requested information would involve the disclosure of personal data.

Is the requested information personal data?

19. Section 1 of the DPA defines personal data as data which relates to living individuals who can be identified:

- From that data

Or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

20. The council have explained that in the period specified by the request there was only one individual falling within the criteria specified and that to reveal the amount of any monies paid, if any, would involve disclosing personal data. They argue that the information requested by the complainant is narrow in that it relates to a very specific period and an individual department within the council. It is therefore possible for the complainant to identify the individual. The Commissioner accepts that the amount paid to an individual in settlement of an Employment Tribunal claim is that individual's personal data.
21. However, the Commissioner must consider whether or not it is possible to anonymise the information to the extent that the individual would not be identified by release of the information.
22. The complainant has argued that the council should not be entitled to refuse to disclose the information to him because of his position as an employee of the council when they might be prepared to release the information to others. The Commissioner notes that the Act is applicant blind and that information disclosed under the Act is considered to be released into the public domain.

23. The Commissioner has referred to his guidance on personal data when considering whether the information could be provided. From his guidance¹ there are two questions that need to be answered when deciding whether the information if disclosed to the public would constitute the personal data of individuals:
- (i) Can a living individual be identified from the data, or, from the data and other information of, or likely to come into the possession of, members of the public?
 - (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?
24. It is clear that the information requested, if linked to an identifiable individual, is the personal data of that individual. The question to be determined is whether a determined member of the public could identify the individual.
25. The Commissioner considers that a determined individual would be able to identify the individual from the data if it were disclosed. He considers that the scope of the complainant's request is such that other employees within the council as well as acquaintances of the individual could be able to identify the individual. The complainant's request is specific in terms of the time period and department and criteria i.e. it is within a six month window, specific to one department and must be a settlement in relation to an Employment Tribunal case which did not go to a full hearing. The Commissioner notes that his guidance states that a point of reference when considering identifiability is whether it is above a slight hypothetical possibility that a very determined individual could identify the individuals involved.
26. The Commissioner is satisfied that the information relates to an identifiable individual and that a determined individual would be able to identify the individual if the information were to be disclosed.

Does the disclosure of the information contravene any of the data protection principles?

27. Having concluded that the information falls within the definition of 'personal data' the Commissioner has 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.

1

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/160408_v1.0_determining_what_is_personal_data_-_quick_reference_guide.pdf

28. In considering whether disclosure of the individual's personal data would be unfair and contravene the first data protection principle the Commissioner has taken into account the existence of the settlement agreement, the reasonable expectations of the data subject and the legitimate interest of the public in knowing the details of any amount paid in the settlement.
29. The council state that disclosure would be unfair as it would reveal the sum of money paid, if any, to the individual. Further, the council state that the individual in reaching the settlement agreement had a reasonable expectation that their information would not be disclosed.
30. 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 their employees' reasonable expectations of privacy.
31. The Commissioner also believes that the legitimate interests of the public in knowing how much money was spent on settlements of this kind must be weighed against the individual's legitimate interests. 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. However, in this case the individual was not in such a senior role and in any case even staff in senior roles would have legitimate expectations of privacy in relation to the type of information in question.
32. In the circumstances of this case the Commissioner finds that disclosure would contravene the first data protection principle. The Commissioner considers that the data subject had a reasonable expectation of privacy and release of the requested information would be likely to cause the data subject distress. Although the information relates to a public official it is information that reveals how a private dispute was settled and the amount of money (if any) received as a result of settling that dispute. The information is more revealing about their private life than their public life. Disclosure would therefore be unfair and a breach of the first data protection principle. The information is therefore exempt under section 40(2) of the Act.
33. The Commissioner has not gone onto consider the application of other exemptions claimed as he has decided the information is exempt under section 40(2).

Procedural Requirements

34. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
- (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.
35. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request. Section 1 states that a person making a request for information is entitled to be informed in writing if the information is held and if so to have the information communicated to him. Full texts of the relevant sections are included in the 'legal annex' section of this notice.
36. The complainant made his request on 22 October 2008. The council responded on 22 December 2008 outside of the 20 working day time limit. The refusal notice failed to specify the exemption correctly and did not explain to the complainant why the exemption applied. In failing to do so the council breached the requirements of section 17(1) and subsections (b) and (c).

The Decision

37. 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:
- (i) the application of section 40(2) to the withheld information
38. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- (ii) the refusal notice was issued in breach of section 17(1) and (b) and (c).

Steps Required

39. The Commissioner requires no steps to be taken.

Other matters

40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Internal Reviews

41. Paragraph 39 of the section 45 Code of Practice (the “Code”) recommends that complaints procedures (internal reviews):

“...should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.”

- 42 Paragraph 40 of the Code further recommends:

“Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint.”

43. The Commissioner notes that, in this instance, the council's internal review was conducted by the same officer who handled the original request and did not, therefore, conform to the Code. The Commissioner is disappointed that, despite previously being directed to the Code's recommendations in this respect (in a decision notice issued in January 2009²) the council's procedure has again failed to conform to the Code.

44. The Commissioner expects that the council's future internal reviews will conform to the Code and directs the Council to follow his published guidance in this matter, available on the ICO website here:

[http://www.ico.gov.uk/what we cover/freedom of information/guidance.aspx](http://www.ico.gov.uk/what_we_cover/freedom_of_information/guidance.aspx)

² ICO reference: FS50184888, viewable on the ICO website here:
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50184888.pdf

Right of Appeal

45. 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 23rd day of September 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

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.