

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 December 2009

Public Authority: CityWest Homes
Address: 21 Grosvenor Place
London
SW1X 7EA

Summary

At the time of the request, the authority was overseeing the development of a residential property, which included the painting of communal areas. As part of this process, CityWest commissioned a survey that asked the residents to vote on their preferred colour scheme. The complainant subsequently requested confirmation of which flat occupants in a particular block voted for which colour. CityWest originally refused the request on the grounds that it was "confidential" information, only later citing section 40(2) and 41 of the Freedom of Information Act 2000 (the "Act"). The Commissioner has found that section 40(2) is engaged and has therefore not gone on to consider the section 41 exemption. He does, however, consider that the authority breached section 17 of the Act in its handling of the request.

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. CityWest was established in April 2002 as an Arms Length Management Organisation; a local authority controlled company solely owned by Westminster City Council.
3. The focus of the request relates to CityWest's management of works at a specified building in London. Part of this development included decorating the

communal parts of the building. CityWest therefore commissioned a survey asking residents to vote on their preferred colour-scheme.

4. The complainant has subsequently questioned the authenticity of the results obtained by CityWest in regards to one block in the property. This was because the decision to choose Dulux White did not seem to correlate with his own enquiries into the colour preference of each resident.

The Request

5. On 22 May 2009, the complainant submitted the following information request to CityWest, via email:

“...pls send me a copy of the results in the consultation – indicating which flat voted for what.”

6. The authority responded on 29 May 2009, providing a breakdown of the votes cast by occupants in seven flats and confirming that a further two flats had not submitted a choice. It did not, however, specify which resident had voted for which colour or give reasons why this information was being withheld.

7. The complainant appealed this decision on 17 August 2009:

“Having spoken with most neighbours they have confirmed that white walls would not have been their first or second choice...As such we doubt the veracity of the results we have been informed of and wish to independently verify this information; and of course will be charged for those works and taking this carefully into account it seems only fair to be able to verify this information.”

8. In reply, CityWest informed the complainant on 18 August 2009 that although it had been prepared to release an anonymised list of the choices made, it would not disclose the “individual flat numbers of who voted for which colour as this would be confidential.”

The Investigation

Scope of the case

9. On 11 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

“Everyone who lives in the building seems to agree that white will show up every mark and is therefore not suitable. One of my concerns is that it may be possible that this simple choice has been decided upon for the convenience of the builders and has not been fully decided upon by the residents / lessees etc. I have been

informed of the votes for the various colour schemes but not how each individual flat voted. So it is impossible to verify this information.”

Chronology

10. In correspondence dated 21 October 2009, CityWest informed the Commissioner that it was relying on sections 40(2) and 41 of the Act as grounds for withholding the requested information.
11. On 17 November 2009, the Commissioner telephoned the authority to request that it provide:
 - details of the way in which the survey was undertaken;
 - copies of any records completed by the residents to mark their choice of vote.
12. On the same day, CityWest emailed the Commissioner copies of the seven forms which documented the colour choice of the residents who had participated in the voting process. Each form, entitled “Resident Choice – Internal Communal Hallway Colour Choices”, consists of:
 - Occupant’s name and address.
 - Signature of occupant.
 - Colour choices available.
 - Tick-box indicating which colour the resident(s) had voted for.
 - Name and signature of the Resident Liaison Officer (‘RLO’).
13. The authority stated that the survey itself was carried out by a contractor. Although CityWest did not hold specific details about the way in which the vote was carried out, it thought that the contractor may have knocked on the doors of the relevant properties or arranged a meeting with the individual residents. Furthermore, CityWest was unable to confirm whether there was any explicit reference made to the confidentiality of the ballot.
14. On 19 November 2009, the Commissioner emailed the complainant to inform him that he had seen the withheld information and could confirm that the colour choices submitted on these forms corresponded with the anonymised results the authority had previously supplied to him. However, given that the information would constitute the residents’ personal data, the Commissioner stated the likelihood that section 40(2) would apply. Consequently, he asked the complainant to submit any arguments to support his position.
15. Later on 19 November 2009, the complainant informed the Commissioner of his disagreement with his findings, stating that he did “not consider the matter to be a private one, [as] it is a communal area. Neighbours we have spoken with are perfectly open to disclose their opinions and none with whom we have spoken voted for this white colour. Also preferences were openly discussed at residents’ meetings.”

16. In view of the complainant's comments, the Commissioner telephoned CityWest on 23 November 2009. Among other points put forward, the authority confirmed that the forms provided represented all the information it held that related to the request. In addition, CityWest advised that the RLO named on the form was the relevant employee of the contractor charged with conducting the survey.
17. The Commissioner telephoned the complainant again on 30 November 2009 to clarify what took place at the meetings of residents. The complainant stated that during the consultation process, a number of steering groups had been set up to give residents a forum in which proposed changes to the building could be discussed. During these meetings, occupants had openly expressed, and talked about, which colour combinations they favoured.

Analysis

Substantive Procedural Matters

18. Section 17(1) provides that a public authority which is seeking to rely on any exemption contained in the Act must give the applicant a notice that: (a) states the fact; (b) specifies the exemption in question; and (c) states why the exemption applies.
19. In stating its refusal to provide the requested information, CityWest failed to cite any section of the Act to support its position, nor did it elucidate the reasons why the section would apply. The authority therefore breached the requirements of section 17(1) of the Act in its handling of the request.
20. In addition, by failing to issue an adequate refusal notice, the authority has also breached 17(7)(a) of the Act. This states that such a notice must –

“...contain the particulars of any procedure provided by the public authority for dealing with complaints or state that the authority does not provide such a procedure.”

Exemptions

Section 40(2) of the Act

21. Section 40(2) of the Act provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 (the “DPA”).
22. In order to rely on the exemption, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines ‘personal data’ as:

“...data which relate to a living individual who can be identified–

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”

- 23. The Commissioner is satisfied that the withheld information constitutes the personal data of those residents who have completed the forms. In this case, the complainant has sought the identification of the resident in connection with the colour choice they have decided on.
- 24. The Commissioner has therefore gone on to assess whether 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 schedule 2 of the DPA is met.
- 25. In considering whether the disclosure of the individual’s personal data would be unfair and contravene the first data protection principle, the Commissioner has taken the following factors into account:
 - i. The reasonable expectations of the residents about what would happen to their personal data.
 - ii. Whether the information relates to the residents’ personal or private life.

Reasonable expectations

- 26. The Commissioner has not been presented with any evidence, such as a statement on the survey form, which indicates that the authority had agreed to keep the residents’ identities confidential when collecting their votes. However, even where no such confidentiality clause exists, the Commissioner must consider what reasonable privacy expectations the residents’ held when taking part in the ballot.
- 27. The Commissioner understands that, on the face of it, the choice of paint colour may not represent a contentious subject. He has also been informed by the complainant that occupants of the flats in question had freely expressed their inclinations in meetings, which would seem to weaken any claim to an expectation of confidentiality.
- 28. However, the Commissioner is aware that the actions taken in regards to the communal area may come to attract a level of acrimony given the attachment of residents to their living space. This is of particular importance given the

submission of the complainant that the lessees would be expected to pay for part of the decorating costs.

29. The Commissioner has therefore found that there is a difference between the preferences apparently voiced at public meetings and the choices put forward on the survey forms which would represent the final, considered vote of the occupants following the consultation process. In view of the formal manner in which this information was collected, the Commissioner has concluded that residents would have a reasonable expectation that their voting choices would not be disclosed.

Public or private life

30. In his guidance on the exemption provided by section 40(2) ('Awareness Guidance on section 40 of the Act'), the Commissioner has drawn a distinction between information about the public and private life of an employee of a public authority. The Commissioner has emphasised that disclosure of information should normally only relate to an employee's public functions, where decisions or actions may be accountable to the population they serve:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

31. In this case, it is clear that the survey commissioned by CityWest was directed at private citizens exercising their right to vote in a personal capacity. While the choice will have an impact on an area shared by other persons, the Commissioner considers that the requested information, namely the casting of a vote, squarely relates to an occupant's private and not public life.

Fairness

32. On balance, the Commissioner has decided that it would be unfair to release the details of which resident voted for which paint colour. This is guided by the knowledge that the information relates to the choices made by individuals in their private lives.
33. In coming to this judgment, he has considered the complainant's doubts about the legitimacy of the voting process, particularly that it was contrived in such a way so as to favour an outcome that would be financially expedient to CityWest. However, the Commissioner has not seen or been provided with any direct evidence that this is the case.
34. Consequently, in finding section 40(2) engaged, the Commissioner has not been convinced that the release of the information would be of sufficient public interest or benefit to the public to override fundamental privacy concerns.

35. As section 40(2) has been found to apply, the Commissioner has not gone on to consider the late application of section 41.

The Decision

36. 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:

- Withholding the requested information pursuant to section 40(2) of the Act

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

- In failing to provide an appropriate refusal notice, CityWest breached sections 17(1) and 17(7)(a) of the Act.

Steps Required

37. The Commissioner requires no steps to be taken.

Other matters

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

Failure to process the information request formally

39. Paragraph 15 of the introduction to the section 45 code of practice (the "Code") recommends:

"All communications in writing to a public authority, including those transmitted by electronic means, may contain or amount to requests for information within the meaning of the Act, and so must be dealt with in accordance with the provisions of the Act."

40. Although the introduction does not form part of the Code itself, the Commissioner would echo its recommendations. In this instance the public authority failed to process the request as a formal request for information.

41. In future, the authority should ensure that it recognises requests for information that require a response compliant with the Act, regardless of the identity of the requester, and respond to these accordingly.

The carrying out of an internal review

42. Part VI of the Code makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. Complaints procedures in this context are commonly termed “internal reviews”.
43. Paragraph 38 of the Code recommends that “Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority’s response to a request for information should be treated as a complaint.” Paragraph 39 of the Code further recommends that the complaints procedure “...should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act.”
44. In this instance, in addition to failing to initially provide the requester with details of its internal review procedure, the public authority also failed to follow the practice recommended in the Code. The Commissioner expects that the public authority’s future handling of requests and internal reviews will conform to the recommendations of the Code and directs the authority to his published guidance in these matters. This is available on the website of the Information Commissioner’s Office at the following address:

http://www.ico.gov.uk/what_we_cover/freedom_of_information/guidance.aspx

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 14th day of December 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

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

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

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

Section 17(4) provides that -

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

Section 17(5) provides that –

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

Section 17(6) provides that –

“Subsection (5) does not apply where –

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

Section 17(7) provides that –

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

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

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

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

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

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”