

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 March 2010

Public Authority: Portsmouth City Council
Address: Civic Offices
Guildhall Square
Portsmouth
PO1 2BG

Summary

The complainant requested information in relation to the awarding of exemptions from Council Tax liability to elected members and Council officers since 1997. The Council withheld all the requested information on the basis that disclosure would breach section 40(2) of the Act. The Commissioner finds that the Council correctly applied section 40(2) in relation to the information requested.

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. On 28 August 2008 the complainant requested the following:

"Please provide details and names of all Council tax Payers and non Council Tax Payers who are and have been exempted from paying Council Tax since 1997 to date, this includes Elected Members and Employees of Portsmouth City Council. This FOI request does not

include those exempted because they have fulfilled the requirements of non payment as a result of being on qualifying state benefits, except for Elected Members and Employees of Portsmouth City Council."

3. On 16 September 2008, the Council issued a refusal notice in which the Council confirmed it held the requested information but that it had applied section 40(2) of the Act and that the information was exempt for the following reasons:

"PCC believes that to disclose would cause it to breach Principles 1 & 2 of the Data Protection Act 1984. The information you have requested is personal data collected and processed by Portsmouth City Council for the purposes of administering council tax to its citizens, particularly in this case those that may be exempt from this tax. It is not collected for onward processing to any third party beyond those declared in PCC's Data Protection Notification (Purpose 7 Assessment and Collection of Taxes and other Revenues)."

The Commissioner noted the Council's reference to the Data Protection Act 1984. The Council verbally confirmed that it meant to refer to the Data Protection Act 1998, and the principles contained within the 1998 Act.

4. On 16 September 2008, the complainant requested the Council carry out an internal review of its decision to withhold information under section 40(2) of the Act.
5. On 18 September 2008, the Council acknowledged the complainant's request for an internal review. The Council stated the following:

"Exceptionally, as the refusal was made under FOI engaging the Data Protection Act exemption, PCC will not consider your appeal or revise our response.

PCC retains its position that it will not disclose personal details (names & addresses of third parties) receiving council tax exemption to you."

The Investigation

Scope of the case

6. On 30 September 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically stated that he did not consider

the Council's argument "*...that they are unable to provide the information because of the Data Protection Act...*" to be valid.

7. On 21 July 2009, the Commissioner asked the complainant to clarify the nature of his request. Specifically he asked the complainant what he meant by the term "*details*" in the first line of his request. The complainant responded on the same date, stating that "*details*" referred to "*...the dates and reasons for any Council Tax exemptions for Council Members and Council Officers...*" The complainant also stated that the request relates only to Council Members and Council Officers. The complainant also asked the Commissioner to consider the Council's refusal to carry out an internal review.
8. In view of the complainant's representations, the Commissioner is satisfied that the request related to the names of any elected members of the Council, and Council employees who were awarded an exemption from Council Tax between 1997 and the date of the request and that the complainant's request for "*details*" related to the dates and reasons for any exemption from Council Tax, rather than any other personal information of those individuals.
9. The Commissioner attempted to informally resolve the complaint on a number of occasions. However, the complainant stated that he would not be prepared to accept partial disclosure because he wanted all requested information.
10. In view of these representations, the Commissioner has investigated the Council's application of section 40(2) of the Act in relation to the complainant's request in its entirety.

Chronology

11. The Commissioner initially wrote to the Council on 21 July 2009 requesting further submissions in relation to its decision to apply section 40(2) of the Act.
12. The Council responded on 29 July 2009. However, the Commissioner required further details of the Council's argument that disclosure would result in a breach of the first principle of the Data Protection Act 1998 (the DPA). Between 29 July 2009 and 3 November 2009, the Commissioner obtained further representations from the Council.

Analysis

Exemptions

Section 40(2) – third party personal information

13. The full text of the legislation referred to can be found in the Legal Annex at the end of this Notice.
14. Subject to the provisions of the DPA, section 40(2) of the Act provides an exemption to the duty to disclose information where the information requested constitutes the personal data of a third party, and where disclosure would breach one of the principles contained within the DPA. Section 40(2) is an absolute exemption and, therefore, there is no requirement to undertake a public interest test under section 2 of the Act.

Is the information personal data?

15. In considering whether the Council has correctly applied section 40(2) of the Act, the Commissioner has first considered whether the information requested can be considered to be 'personal data'.
16. The Council considers that the names of Council members and Council employees in receipt of an exemption from Council Tax liability, the reasons for such exemptions and dates of such exemptions to be the personal data of those individuals to whom this information refers.
17. According to section 1(1) of the DPA, personal data can be defined as follows:

" '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."

18. In considering whether the information requested is 'personal data', the Commissioner has also taken into account his own guidance on the issue¹.

¹http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

19. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable. Information will “relate to” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The Commissioner is satisfied that, taken together, the names of Council members and Council officers who have been awarded an exemption from the liability to pay Council Tax, the reasons for such exemptions from Council Tax, and the dates on which such exemptions were granted can be considered to be personal data.
20. In reaching this view, the Commissioner is also mindful of the Information tribunal views in appeal number EA/2006/0060 and 0066², in which the Tribunal stated that the information requested in that particular case was personal data because “it says something about somebody’s private life and is biographically significant”. The Commissioner considers that the information requested in this particular case is also biographically significant.

Would disclosure contravene any of the principles of the DPA?

21. In its refusal notice, the Council stated that it considers disclosure of the information requested would breach the first and second principles of the DPA. As outlined in the Commissioner’s guidance on section 40(2) of the Act³, the Commissioner considers it is likely only the first principle will be relevant when considering disclosure under the Act. The Council’s arguments in respect of the first principle are considered at paragraphs 26 to 38.
22. The Council stated that disclosure would breach the second principle, which states that “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”. However, the Commissioner considers that disclosure under the Act that complies with the DPA in other respects will not breach the second principle. The Commissioner does not consider the disclosure of personal data in response to an FOI request to be a specific purpose for which such information is processed. In responding to a request for information under the Act, a public authority is not fulfilling one of its business purposes; it is simply complying with a legal obligation.

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i146/ENgland.pdf>

³ http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

23. The Commissioner is of the view it would be difficult to argue that, as a rule, compliance with a legal obligation, such as that imposed by the Act, would be incompatible with the other purposes for which personal data may be processed. Therefore, the Commissioner rejects the argument that a disclosure in response to a request under the Act would, in itself, breach the second data protection principle.
24. The Commissioner has therefore considered the first data protection principle in order to establish whether disclosure under the Act complies with the DPA in other respects.

First Data Protection Principle

25. The first data protection principle 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.”

Schedules 2 and 3 to the DPA set out conditions under which personal data may be processed, such as the consent of the data subject, and the legitimate interests of the data controller.

26. In this case the Commissioner does not consider the majority of the withheld information to constitute sensitive personal data. However, the Commissioner acknowledges that at least part of the withheld information could relate to sensitive personal data – for example, disclosure of an individual’s name, together with confirmation that the individual had been granted an exemption on the basis that they may be ‘severely mentally impaired’ or could be considered to be a ‘long-stay hospital patient’, and the date that such an exemption was granted⁴. In these cases, the Commissioner considers that such personal data consists of information as to an individual’s physical or mental health or condition, in line with section 2(e) of the DPA. The issue of potential disclosure of sensitive personal data is considered at paragraphs 30 and 35 below.

Would disclosure of the information be unfair?

27. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection

⁴ <http://www.portsmouth.gov.uk/living/2045.html>

principle, the Commissioner has taken the following factors into account

- the reasonable expectations of the individuals regarding what would happen to their personal data;
 - whether disclosure would cause any unwarranted harm to the individuals in question.
28. The Council stated that there would not be a reasonable expectation that any 'Council Tax information' should be disclosed. The Council stated that any such information was obtained for the purposes of administering Council Tax and determining those eligible for exemption. The Council stated that any processing for purposes beyond these would "mislead or deceive those eligible for exemption".
29. The Council also argued that disclosure of any of the information requested could cause "distress or detriment" to those eligible for exemption from Council Tax liability. In reaching this view, the Council advised that there was an expectation that it would "maintain a duty of confidentiality" in relation to the personal circumstances of individuals. In particular, the Council referred to the distress or detriment which may result from disclosure of names, which, when 'aggregated' with other information such as an address from the Electoral Roll, could give an indication of an individual's status – for example, an exemption awarded due to religious occupation, armed forces or someone in receipt of personal care.
30. The Council also stated that at least some of the information requested could be considered to be sensitive personal data, and identified tax exemptions relating to religious occupation and those receiving personal care as examples of such sensitive personal data.
31. The complainant stated that he is not interested in members or employees "who may have been granted Council Tax exemption because of disability or age". The complainant stated that he is more concerned with corruption in relation to eligibility for exemption from Council Tax and issues such as "probity in public office".
32. The Commissioner acknowledges that some of the individuals to whom the request relates carry out public functions – i.e. elected Councillors. As such, the Commissioner considers that these individuals should have an expectation that their public actions would be scrutinised to a greater degree than those who do not carry out such public functions.
33. However, the Commissioner does not consider that the information requested in this particular case relates to the public functions of the

Councillors in question. Furthermore, the Commissioner notes that the information requested could relate to such private issues as whether a member of the household has a disability, is a student or is in receipt of personal care. This clearly does not relate to the public functions of a Councillor.

34. The Commissioner does not consider that an individual's employment with the Council should mean that their expectations in relation to disclosure of such information should be any different from the expectations of members of the general public. Whilst the Commissioner acknowledges that Council employees should expect that certain information may be more readily available than if they were not employed by a public authority, the Commissioner does not accept that this should include, for example, such information as whether their property contains a 'granny annexe' or whether household members are in receipt of personal care. In these cases, the Commissioner considers that an individual's expectations will be the same regardless of their employment, and that any individual would consider the disclosure of their identity, together with information that is clearly of a personal nature, has the potential to cause a great deal of unwarranted interference with their privacy.
35. As stated earlier at paragraph 27, the Commissioner is of the view that a proportion of the requested information will constitute sensitive personal data. Such information will have greater biographical significance for the individual, and any release is more likely to cause significant detriment and a greater invasion of privacy. The Commissioner considers therefore that the arguments concerning fairness and reasonable expectation carry even greater weight when applied to the disclosure of sensitive personal data.
36. The Commissioner then considered whether it would be possible to 'anonymise' the names, reasons for and dates of exemptions from the liability to pay Council Tax in such a way that identification would not be possible by a member of the general public. In determining whether this is possible, the Commissioner considered whether a member of the general public would be able to identify an individual from information already in the public domain.
37. The Commissioner is not aware of any way in which the information requested could be anonymised in a way that would render the information still acceptable to the complainant. During the course of his investigation, the Commissioner attempted to resolve the issue informally by suggesting that the names be removed, but partial disclosure was not acceptable to the complainant. Furthermore, the Commissioner also considers that the small geographical area to which

the request relates increased the likelihood that individuals, including those with duplicated names, could be identified by using information already in the public domain – for example, the Electoral Roll or, in cases where an exemption has been granted due to bankruptcy, the Insolvency Service's Individual Insolvency Register⁵.

38. The Commissioner therefore considers that disclosure of the information requested would be unfair, and the Council was correct in its application of section 40(2) of the Act.

The Decision

39. The Commissioner's decision is that the public authority was correct in its application of section 40(2) of the Act to the information requested.

Other Matters

40. In reference to the Council's internal review, paragraph 38 of the section 45 Code of Practice (the "Code") states:

"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...These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application."

The complainant requested an internal review on 16 September 2008 and the Council responded on 18 September 2008 stating:

"Exceptionally, as a refusal was made under FOI engaging the Data Protection Act exemption, PCC will not consider your appeal or revise our response."

The Commissioner considers that, in failing to conduct an internal review, the Council's practice does not conform to the recommendations of the Code. The Commissioner expects that, in

⁵ <http://www.insolvency.gov.uk/bankruptcy/bankruptcysearch.htm>

Reference: FS50216431



future, the Council will conduct internal reviews in accordance with the Code.

Right of Appeal

41. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 24th day of March 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 17 - 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 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)."

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.

(2) 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,

(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, at the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1

The first data protection principle

“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.”

The second data protection principle

“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.”