

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 November 2010

Public Authority: The Local Government Ombudsman
Address: 10th Floor
Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant requested statistical information from the Local Government Ombudsman (the 'LGO') regarding the work of one individual case officer. The LGO claimed that the information was exempt under sections 40 and 36 and that it also wished to rely on section 12 of the Act.

The Commissioner's decision is that the information is the personal data of the case officer and that disclosing the information would be unfair for the purposes of the first data protection principle of the Data Protection Act 1998. Accordingly his decision is that the information is exempt under section 40 of the Act. He has not therefore considered the application of the other exemptions further.

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 1 May 2009 the complainant requested the following information:
 - "1. When was [case officer A] appointed as an investigator?

2. Since that date, in how many cases has [case officer A] issued, or recommended the issuing of, a public report.
3. During the last twelve months, how many complaints has [case officer A] dealt with?
4. In how many of these cases has [case officer A] found maladministration?
5. In how many of these cases has he found injustice?
6. In how many of these cases has [case officer A] made recommendations to the Councils concerned?
7. During the last twelve months, in how many cases has [case officer A] not found maladministration?
8. In how many of these cases has [case officer A] not found injustice?
9. During the last twelve months, in how many cases has [case officer A] found no fault at all in the Council complained of?
10. During this period, in how many cases has [case officer A] made no recommendations at all to the Council concerned?
11. During the last twelve months, on how many occasions has [case officer A] issued, or recommend the issuing of, a public report.
12. Does the Local Government Ombudsman currently retain on computer copies of letters of complaints dealt with by [case officer A] over the last twelve months.
13. Does the Local Government Ombudsmen currently retain on computer copies of provisional findings made by [case officer A] over the last twelve months.
14. Does the Local Government Ombudsmen currently retain on computer copies of final decisions made by [case officer A] over the last twelve months.
15. If the answers to 12, 13 and 14 is "No", for what period does the Ombudsmen retain the three types of records referred to?
16. What records does the Ombudsman keep of the outcome of complaints?

17. What records does the Ombudsman hold of the outcome of complaints dealt with by [case officer A] during the last twelve months?
 18. Please supply any of these records not covered by previous questions."
3. On 14 May 2009 the LGO advised the complainant that he was not entitled to most of the information requested because it was a "personal and a personnel matter". It did however provide advice on the LGO's general policy on storage and retention of communications and decisions. The LGO did not state any relevant exemption from the Act.
 4. On 2 June 2009 the Complainant requested that the LGO review its decision. The LGO responded on 11 June 2009. It stated that the majority of the information was exempt under section 40 (personal data) and 36 (prejudice to the effective conduct of public affairs) of the Act. However it provided information in response to questions 12, 13, 14, 15 and 17 and explained its records management practices as regards question 16.

The Investigation

Scope of the case

5. On 28 June 2009 the complainant wrote to the Commissioner asking how to make a formal complaint regarding the LGO's decision. This was responded to on 25 July 2009, explaining the documents which the Commissioner would need in order to progress the complaint. The complainant then sent in the necessary documents on 1 August 2009.
6. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
7. The Commissioner notes that the LGO provided a response to questions 12, to 17. He has not therefore considered these particular questions further in this Decision Notice.

Chronology

8. The Commissioner proceeded in the first instance to address some good practice issues which he had noted regarding the response of the LGO to the case.
9. On 6 July 2010 the Commissioner wrote to the LGO stating that he was about to investigate the LGO's refusal of the complainant's request.
10. The LGO responded on 20 July 2010. It asked for clarification on a number of points, and this was subsequently provided.
11. The LGO then responded on 11 August 2010, and provided further information on 10 September 2010. In that letter the PA stated that it wished to rely upon section 12 of the Act in addition to its reliance upon sections 40 and 36.

Analysis

Substantive Procedural Matters

12. The LGO's initial response to the complainant did not state specifically the exemption which it was choosing to rely upon when withholding the information. The Commissioner notes however that it did allude to the fact that the information was being withheld on the basis that the information was personal to the case officer.
13. Nevertheless section 17(1)(b) of the Act requires that the authority specifically states the exemption which it is relying upon. The Commissioner's decision is therefore that the authority breached section 17(1)(b).

Exemptions

Section 40

14. The LGO stated that the information was exempt because it is the personal data of case officer A. The rights of an individual under DPA are not compromised by the provisions of the Freedom of Information Act. Section 40 of the Act provides an exemption relating to personal information in various ways.
15. Section 40(2) provides an exemption to disclosure where the information is the personal data of a third party and a disclosure of

that information would breach one of the data protection principles of the DPA.

Is the information personal data?

16. The complainant made a number of requests seeking statistical information about case officer A's history of investigations at the LGO. He was seeking a statistical record of the decisions made by case officer A for the LGO.
17. Section 1 of the DPA defines personal data as data which relate to a living individual who can be identified:
 - from those data, or
 - 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. The complainant would already be aware of the identity of the case officer. Responding to the requests would therefore provide detailed information on case officer A's personal performance at the LGO. The Commissioner is therefore satisfied that the information is personal data relating to case officer A.

The data protection principles

19. Section 40 excludes personal data from disclosure if disclosing it would breach one of the data protection principles of the DPA.
20. The First Data Protection Principle requires that personal information should be processed "fairly". In order for a disclosure of this information to be fair, case officer A would generally have to have had an expectation that his information may be disclosed by his employer to any member of the public at the time that he first provided it. This might be because the LGO told him that that would occur or because it would have been obvious at the time he was providing it. Alternatively another reason might apply which would make that disclosure fair.
21. The Commissioner recognises that case officer A did not, as such 'provide' the information to the LGO. Rather, the information is a record of his performance at the LGO and a record of his decisions.
22. The Commissioner recognises that as a case officer in a public authority, case officer A should have had some expectation that some details of his employment and his decisions were likely to be disclosed as a matter of course during his work. Details of the cases he is tasked to work on, letters he has written to authorities and complainants and the decisions he makes are all likely to be disclosed during the course

of business. Further information may be available to the complainant in a particular case about the actions of the case officer if the complainant were to make a subject access request.

23. However in this case the disclosure of the information requested by the complainant would be much wider. It would involve a global disclosure of the overall performance of the case officer. The Commissioner must therefore consider whether case officer A would have an expectation that details of his work performance would be disclosed to any member of the public in response to a request. If a public authority is prepared to disclose the requested information to an applicant under the Act it must be prepared to disclose the same information to any other member of the public who asks for it. The Commissioner however considers that it may not be fair to disclose personal data as widely as this if the individual concerned only expected a limited disclosure of his information. The Commissioner has therefore considered this aspect further.

Would that level of disclosure lies within Case Officer A's expectations?

24. The Commissioner notes that the information concerns the work of case officer A, details of his decisions in cases and details of his personal experience. The Commissioner considers that individuals who are paid from the public purse should have an expectation that some information on their work or their salary may be disclosed in response to a request. The Commissioner has already highlighted that a case officer might expect some information to be disclosed as a matter of course. However the limits to the extent of that disclosure would be dependent upon the role and the seniority of the employee, and the nature of the information in question. He has therefore considered these factors when deciding whether the information can be disclosed.

The nature of the information in question

25. In *House of Commons v ICO & Norman Baker MP* (EA/2006/0015 and 0016) the Information Tribunal found that where information is about officials acting in their public capacity then there should be an expectation by those individuals that their actions will be subject to a greater level of scrutiny than would otherwise be the case. However it drew a distinction between information on the public lives of public servants and their private lives.
26. In the Information Tribunal's decision, the House of Commons argued that a disclosure of information on the travel arrangements of Members of Parliament would inevitably reflect personal and family circumstances to some degree. The Tribunal found this to be correct, but found that the above principle "...still applies even where a few

aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to a data subject's public life." (at para 78).

27. The Commissioner recognises that the request refers specifically to work carried out by case officer A in the performance of his duties. On the face of it therefore the information specifically addresses aspects of his public role and life.
28. However the Commissioner recognises that the nature of the questions asked, when considered together, would provide the recipient with a reasonably detailed overview of case officer A's performance, his work levels, his level of experience and the number of complaints made about him.
29. The Commissioner considers that details of an individual's performance at this level relate more to his private life than to his public role. His public role reflects the work he does and the decisions he makes on individual cases for a complainant. This public role is overseen by his employers who hold overall accountability for ensuring that the end decision is appropriate. His private role reflects his effectiveness as an employee: how quickly he works, his approach to his work, how much work is required on the recommendations and decisions he takes before they are suitable to be issued. At case officer level the individual is accountable for his performance to his employers rather than to the public. This is a private matter between the individual and the employer rather than the public at large.

The seniority of case officer A

30. Public and civil servants of all levels are accountable to their employers. Their employers as a whole, and individual members of an authority at the most senior level should also be accountable for their actions to the general public. The public should be able to scrutinise the efficiency and the effectiveness of a public organisation, and in order to allow this the authority may need to provide information which highlights the effectiveness of some individuals such as senior managers. The Commissioner has therefore considered whether the seniority of a case officer role may make it fair to disclose that type of information.
31. At lower levels of seniority the employees' performance is the responsibility of his managers and ultimately, the Ombudsman himself. It is not a matter which it is necessary for the general public to know about in order to be able to obtain a picture of the efficiency and the effectiveness of the authority as a whole.

32. The Commissioner considers that case officers within the Ombudsman's office are not senior enough to require the release of the specific, individual level of performance which could be established from the disclosure of this information. Whilst case officers should be accountable for their decisions to their managers and, to an extent, to the individual complainants who may be affected by their decisions, disclosures under the FOI Act are at a wider, more public level. Neither should all of their work be open so that those who are aggrieved by their handling of particular cases are able to analyse and potentially pick flaws with their more general performance.
33. The Commissioner therefore considers that a release of that degree of information on the individual case officer's performance is not necessary in order to facilitate transparency and accountability of the Ombudsman's office. The case officer would not therefore be likely to expect that this information relating personally to him would be disclosed to any member of the public in response to a request.

Would any damage or distress be caused by the disclosure?

34. The Commissioner has considered whether the disclosure of the information might cause damage or distress to the case officer. In this instance he notes that there would be no expectation of wider accountability for the decisions taken by the Ombudsman at case officer level. The accountability should rest with the Ombudsman and senior managers.
35. In Lord Baker v The Department for Communities and Local Government (EA/2006/0043) decision at para 17 the Tribunal stated:
- "We think that there is a potential difference, from the perspective of a civil servant, between a situation where he or she advises on – and possibly assists the Minister in interpreting - general policy and one where the advice concerns an administrative decision. In the latter case the advice may well have a more immediate impact on the lives of those affected by it and in controversial cases this might even result in more direct, possibly virulent, criticism of his or her contribution to the decision."
36. Cases considered by the LGO already relate to ongoing grievances between a local authority and a complainant. Where a case officer's decision goes against the wishes of the complainant then it is possible that the complainant will feel disappointed and angry by that decision. Whilst it is correct for the case officer's decision to be questioned through the appropriate complaint procedures, the Commissioner does not consider that statistical analysis of his or her performance in all of

his other cases should be disclosed; particularly if the result of that may be the “direct, virulent criticism” suggested by the Tribunal. The Commissioner also notes the general loss of privacy such a disclosure would entail is also a detriment to the individual.

Are there any compelling public interest factors in favour of disclosure?

37. The Commissioner will also consider the wider circumstances before making a decision as to whether a disclosure would be fair or not. One such factor may be where there is a known and compelling public interest argument in favour of disclosure.
38. Notwithstanding the individual’s reasonable expectations or any damage or distress that might be caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
39. Clearly the disclosure of this sort of information would allow the public to properly assess the work of the individual case officer and make their own assessment of his performance. However the Commissioner has already recognised that the ultimate accountability for the decisions taken by the Ombudsman’s Office should rest at a higher level than at a case officer’s level.
40. The Commissioner also recognises that there is a public interest in allowing public servants a degree of anonymity under which to perform their duties. In each department there will be individuals responsible for the decisions taken in that department, and these will have oversight of the decisions taken by the public servants within that department. The LGO has met its obligations to be open and accountable by providing statistical analysis of the decisions it has taken as an office. Individual case officers will be accountable as they will be known to the complainant and there will be procedures within the organisation to handle complaints about their case handling.
41. The Commissioner does not therefore recognise a compelling public interest in allowing a greater analysis of decision making at case officer level. This would potentially give rise to public criticism of a relatively low level individual within the authority, which is not necessary to establish the effectiveness of the organisation, or to question the decision of the case officer in a particular case.
42. The Commissioner’s decision is therefore that there are no compelling public interest factors in favour of disclosure. Accordingly the Commissioner’s decision is that a disclosure of this information would be unfair for the purposes of the first data protection principle. A disclosure would therefore breach the first data protection principle.

43. The Commissioners decision is therefore that section 40(2) is applicable to the withheld information.

Section 36 and Section 12

44. Given the Commissioners decision that the information may be withheld under section 40(2) he does not consider it necessary to consider the application of sections 12 and 36 to the information.

The Decision

45. 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:

It correctly applied section 40(2) to withhold the information.

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

The LGO breached section 17(1)(b) in not stating the exemption it was relying upon in its refusal notice to the complainant.

Steps Required

47. The Commissioner requires no steps to be taken

Right of Appeal

48. 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 sent.

Dated the 4th day of November 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

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.

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.”