

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 February 2010

Public Authority: Hartlepool Borough Council
Address: Legal Services Division
Civic Centre
Victoria Road
Hartlepool
Cleveland
TS24 8AY

Summary

The complainant requested information concerning the Council's purchase of a block of properties. He wanted to ensure that the relevant individuals who sold them had been fully compensated. He requested the details of the sellers, the address of the property, the amount paid for the property and the amount paid in compensation. The Council originally applied sections 21, 41 and 43. It upheld its application of section 21 in its internal review. During the Commissioner's investigation further information was released, leaving only the individual amounts of compensation and the details of the sellers outstanding. The complainant then agreed to withdraw his complaint about the details of the sellers, but still wished to acquire the amount of compensation paid against each property. The public authority then agreed to provide a list of the addresses with a tick against those for which it had paid compensation. For the remaining information (the amount paid in compensation to each property owner), the Commissioner has found that section 40(2) was applied correctly. He did not go on to consider section 41(1). He did find procedural breaches of sections 1(1)(b), 10(1) 17(1) 17(1)(b) and 17(1)(c), but requires no remedial steps to be taken in this case.

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. In 1995 land on the edge of Hartlepool which was in the ownership of Durham County Council (DCC) was sold off to private house developers before DCC was abolished by Central Government in 1996. This led to a large growth of private house building on the edge of the town meaning by the end of the 1990's, buyers, particularly first time buyers in the town had new opportunities to access the home ownership market.
3. The historic market for the terrace properties in central Hartlepool had been first time buyers. However, these first time buyers were now in a position where they could 'leap frog' to new build properties. Property prices in the central area went into 'free fall' by the late 1990's and at the same time a named company began purchasing large numbers of terraced properties. This company was subsequently found to be fraudulent and professionally discredited with 4 of the 5 Directors serving prison sentences following a legal case by the Department for Trade and Industry.
4. The actions of this company and the following boom in 'buy to let/keep empty' purchasing allegedly led to problems for the remaining residents, which included antisocial behaviour, crime, stigmatisation and general neglect by owners of some properties. It also meant that owners who could not afford to move were trapped.
5. These remaining communities mobilised themselves and pressured the Council to take action to address the problems, which involved various things happening to help improve the living environment for residents and two key documents/plans were developed; the Community Housing Plan and the North Central Hartlepool Master Plan. Both of those were developed with direct resident involvement.
6. Hartlepool's Housing and Regeneration Strategies reflected these changes strongly, with housing regeneration becoming the main thrust of the adopted Local Plan 2006, for Hartlepool. The Council and users groups lobbied hard for funding to progress housing market renewal in the Town and this commenced in 2003. Funding has been secured incrementally and so far over 600 properties have been acquired and demolished and these are being replaced by just over 300 new build properties.
7. The Council has gradually acquired a number of properties specified in this request. The Council devoted its resources to supporting strategic acquisition within key areas in partnership with Housing Hartlepool and Hartlepool Revival. The request concerns one of the key areas.
8. Each owner has been individually contacted by appropriate Council staff about the scheme and about selling their property by agreement.
9. Compulsory Purchase Order (CPO) powers were used on a small minority of the 600 properties but the CPO covered the whole 600 in order to 'clean' the title of the land. There were also two individual inquiries about the delivery of the plans and the processes that were undertaken. The inspectors who conducted those

enquiries both upheld the decisions to deliver the plans and were supportive of the processes followed by Hartlepool Borough Council.

10. Once all the information has been gathered about who is willing to sell and who is not, together with partners and funding organisations agreement will be sought to secure the earmarking of future funding for the scheme. Proposals will then be put to the Cabinet of the Council to consider the use of the Council's statutory powers of CPO, if needed. Most of these actions are underway and a Cabinet report will be put before Cabinet by March 2010 to make this decision. However, at present all the funding available has been earmarked for purchases that have already been agreed with owners.
11. Funding for the housing market renewal programme came almost exclusively from sources external to the Council, primarily the North East Housing Board through the Single Housing Investment Pot (SHIP) and the Department of Communities and Local Government via the Housing Market Renewal Fund (HMRF).
12. Funding allocations for the programmes are released annually and allocations are heavily monitored via an internal audit process, external audit processes and the National Audit Office. The Council is only able to pay market value for property and it must justify why a price is being paid by comparison to similar property in the Town and to similar areas to the programme area.

The Request

13. On 15 June 2009 the complainant requested the following information in accordance with section 1(1) of the Act (the Commissioner has changed the format of the first paragraph so that it is clearer):

'Freedom of information Act application of properties within Gray Street, Perth Street, Hurworth Street, Turnbull Street (46-68 inclusive), Grainger Street (1-21 inclusive), Raby Road (144-160) and 40 Brougham Terrace.

... I would be grateful if Hartlepool Borough Council would provide me with details of those properties and individuals that had their properties acquired by Hartlepool Borough Council and Hartlepool Housing during the course of the last 3 years. In particular, I require details of the properties that they acquired, the prices paid and any breakdown between prices paid and other compensation made.'

14. On 3 July 2009 the public authority issued a response. It stated that it felt that section 21(1) applied to the ownership details and the purchase price as a Land Registry search would identify the purchaser (the Council in this instance) and the price paid. In relation to the other compensation it informed the complainant that it was applying section 41(1) as compensation is agreed between it and the owner subject to an individual financial assessment. It explained that it felt that the disclosure of this information would be an actionable breach of confidence

against the Council, to which it had no defence. It also explained that it felt the information was exempt by virtue of section 43(2) as it may prejudice the commercial interests of the Council. It explained that this was because future negotiations may be prejudiced and prevent the Council from procuring best value and lead to less efficient spending of public money. It explained that the Council did operate within strict limits set by relevant legislation in relation to compensation that is payable.

15. On 7 July 2009 the complainant requested an internal review. In particular, he stated that it was essential that the owners were rightfully compensated and the response did not allow this to be done. He said that he may accept a list of the properties acquired and then he would undertake the Land Registry Searches. He explained that this will allow him to contact the claimants directly to enable them to confirm the terms of settlement.
16. On 17 July 2009 the public authority communicated the result of its internal review. It explained that it still felt that section 21 applied to all the property addresses. In order to comply with its section 16 obligations it provided a map with the properties purchased by it edged in blue. It also provided the details of the Information Commissioner in the event that the complainant remained dissatisfied.

The Investigation

Scope of the case

17. On 29 July 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:
 - * That he wanted to ensure that the individuals had received appropriate compensation.
 - * That all the information may not be available at the Land Registry as it would require the Council to register their acquisition of the properties.
 - * That he originally required the contact details of the parties that had been compensated. The Commissioner believes that his request can be read to include this information.
18. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - * The Commissioner asked the public authority to release a list of the addresses of the properties as he agreed with the public authority's new position that section 21 could not be applied. The public authority did so on 8 October 2009.

- * The Commissioner asked the public authority to release a list of the price paid for all the houses as he did not believe that section 21 was applied correctly to them. The public authority did so on 19 October 2009.
 - * The Commissioner asked the public authority to release a list of the commercial owners of property and the compensation paid to them. This was because he did not think section 40(2), 41(1) or 43(2) could be applied to this information. The public authority also disclosed this information on 19 October 2009.
 - * The Commissioner asked the public authority to release the global amount of compensation paid. This was released on 23 November 2009.
 - * The complainant agreed to withdraw his request for the names and contact details of the sellers on 4 December 2009.
 - * After further correspondence, the public authority agreed to release the addresses of properties together with a tick next to those properties whose former owners were paid compensation. This information was disclosed on 18 January 2010.
19. The only information that is outstanding and will be considered in this notice is:

'The amount of compensation paid by the Council when it acquired each property.'

20. 'Compensation' is defined as additional money paid by the Council, beyond the market value of the property. This does not include the legal services that the Commissioner understands were provided by the Council to enable individuals to sell their properties to it.

Chronology

21. On 2 September 2009 the Commissioner wrote to the public authority to inform it that he had received a complaint about this request. He asked for the public authority's arguments and for a copy of the withheld information.
22. On 29 September 2009 the public authority provided the Commissioner with a response and a copy of the withheld information. It explained that it had read an Information Tribunal case¹ and was prepared to release the addresses of the properties that it had acquired; as it now appreciated that section 21 might not apply in the event that the properties were unregistered. It explained that it now wished to apply section 40(2) to the names and the compensation paid. It explained why it was relying on sections 41(1) and 43(2) with respect to the compensation payments.

¹ *Mr C P England and London Borough of Bexley v Information Commissioner*
[EA/2006/0060 and EA/2006/0066]

The judgment can be found at the following link:

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

23. On 8 October 2009 the Commissioner telephoned the public authority. He explained the case was allocated to a case officer and that he would appreciate it releasing to the complainant the addresses of the properties it acquired as it had agreed to do. The public authority released the list of the addresses on the same day.
24. On 12 October 2009 the Commissioner telephoned the complainant to enquire whether he had received the addresses of the properties. He was informed that he had not.
25. On 13 October 2009 the Commissioner telephoned the public authority again. He had an enquiry about one aspect of the withheld information. He explained that he had searched for every property at the Land Registry and could confirm that they were not all present. He had also looked at a number of property price websites and still could only acquire an incomplete picture. He stated that he did not believe that section 21 could apply to the property prices and that he would appreciate it if this information was disclosed informally. He also explained that he did not believe that any exemptions could be relied upon in relation to information about commercial owners' properties and invited the public authority to disclose this information as well.
26. On 14 October 2009 the complainant wrote to the public authority and copied the letter to the Commissioner. He explained that he was unhappy he had only received the addresses and expected the contact details to be provided too. He said he believed the Commissioner said that he was entitled to them.
27. On 15 October 2009 the public authority contacted the Commissioner to express concern at what the complainant said had been promised to him. This confusion had arisen as a result of the complainant misunderstanding that the contact details were still subject to consideration by the Commissioner – clarified to the Council on 15 October 2009.
28. On 19 October 2009 the public authority responded to the Commissioner. It clarified his query about the withheld information. It also provided evidence that it had now disclosed the following to the complainant:
 - * The price paid for every property (excluding the compensation).
 - * The names of the commercial entities who had sold their properties and which properties they were.
 - * It also confirmed that it had not paid any compensation to those commercial entities.
29. Also on 19 October 2009 the Commissioner made detailed enquiries about the remainder of the withheld information. He wanted the public authority to provide detail of the background and explain in full its application of sections 40(2), 41(1) and 43(2). He also asked that the global figure for compensation was released to

- the complainant as he was not clear that any exemption could apply to that information.
30. On 20 November 2009 the Commissioner received a response to these enquires. The public authority explained that it was prepared to release the global figure for compensation. Also on 20 November 2009 the Commissioner wrote to the complainant to explain his preliminary verdict in this matter and asked whether he wished for the investigation to continue.
 31. On 23 November 2009 the public authority released the global figure for compensation to the complainant.
 32. On 4 December 2009 the complainant responded to the Commissioner's letter. He explained that he did want the investigation to proceed. However, he explained that he was prepared to withdraw his request for the names and contact details of the sellers. He explained that he believed that the amount of individual compensation paid should be disclosed as it would be in the public interest and that the Commissioner may have erred in not considering the gravity of the situation. He provided the Commissioner with further argument and evidence. He explained that it was important for the data subjects who had not been compensated to be identified as such and that there were questions about the nature of how those properties were acquired. He also provided a link to a set of minutes that linked to a report about how the programme has been carried out. Finally, he asked for the Commissioner to consider the breaches of the Act in relation to the information that had subsequently been provided.
 33. On 7 December 2009 the Commissioner wrote to the complainant. He explained that he would consider the new evidence that had been provided and draft the appropriate Decision Notice. He stated that he would focus on the outstanding information. On the same day, the complainant acknowledged the Commissioner's email.
 34. On 10 December 2009 the Commissioner telephoned the public authority. He explained that given that the request for contact details had been withdrawn and the new evidence provided by the complainant, he believed that information about whether compensation had been paid against each property should be considered for disclosure. The public authority explained that it would consider this position and reply to explain whether it was possible.
 35. On 16 December 2009 the public authority telephoned the Commissioner in order to fully understand what was meant by compensation. The public authority and the Commissioner agreed the definition in paragraph 20 above. Later on the same day, the public authority called again and explained that it was reluctant to disclose this information. The Commissioner explained he would like further submissions about why the public authority believed that this information should not be disclosed.
 36. On 8 January 2010 the Commissioner received further submissions from the public authority. Later on the same day, the Commissioner wrote to the public authority explaining that he was not convinced by them and asking for the public

authority to reconsider its position. On 15 January 2010 the public authority agreed to reconsider its position and also explained that the information it had previously provided contained one error and that it would use this opportunity to rectify it.

37. On 18 January 2010 the public authority disclosed the list of addresses and a tick against those properties that had received compensation to the complainant. It also corrected its previous error.

Findings of fact

38. Compensation payable to sellers may consist of both statutory and non-statutory payments.
39. Section 30 of the Land Compensation Act 1973 (as amended) sets out that any home-loss payment should be paid at a rate of 10% of the agreed property purchase price.
40. It is also possible for further compensation to be paid to the sellers and this possibility is derived from the Council's Housing Regeneration Policy.

Analysis

Substantive Procedural Matters

What recorded information is held?

41. The public authority maintains a spreadsheet. This contains a field against the property noting how much compensation has been paid. It is this information that the complainant has requested and will be considered in this case.

Exemptions

42. In the public authority's submissions it argued that sections 40(2) [third party personal data] and 41(1) [confidentiality] applied to this information. It withdrew its original reliance on section 43(2) [commercial interests].
43. It did not apply section 40(2) by the time of its internal review, so the first question is whether the Commissioner should accept the submissions about the new exemption. The Commissioner has the discretion to accept the late application of exemptions where the circumstances of the particular case present a reasonable reason to do so. The Commissioner believes that in this case the public authority identified the harm that was likely to arise but applied the facts and reasoning to the wrong exemption. He notes that the new exemption was relied on within the first exchange of correspondence with the Commissioner and was done so proactively. He therefore has decided that he will allow the public authority to raise arguments about the application of section 40(2) in this case.

44. The Commissioner's discretion to accept arguments when the exemptions have been applied late has been confirmed by the Information Tribunal in *Bowbrick v Information Commissioner* at paragraph 51, where it was confirmed that the Commissioner had discretion under the Act to look at section 40 issues when considering cases under the Act (even where it had not been cited by the public authority):

'If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects....Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.'

45. The Commissioner agrees that as he is the Regulator of the Data Protection Act, he should consider data protection issues where they arise on the facts of the case. This provides further reasoning about why he has used his discretion to consider section 40(2) in this case.
46. For information to be correctly withheld the public authority is required to prove to the Commissioner that one exemption has been correctly applied. Once one exemption has been correctly applied then the information is exempt and can be withheld from the public.
47. The Commissioner has decided to consider the operation of section 40(2) first.

Section 40(2)

48. The public authority has argued that the disclosure of the amount of compensation it paid to any individual would involve disclosing personal data and that doing so would contravene one of the data protection principles of the Data Protection Act 1998 ("DPA"). As such it would be exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i).
49. It explained that it had now provided accountability by publishing the global amount of compensation paid and a list of addresses to which compensation was paid. The further disclosure would amount to a disclosure of an individually negotiated sum, of which the reasonable expectation of the data subjects would be that this information would be private. The release of this information would therefore be unfair to the data subjects.
50. The complainant has argued that all of this information should be disclosed. He has explained that there is a considerable amount of public money involved in this project and that it is important that the former householders understand their rights and can claim all the money to which they are entitled. The complainant has indicated that the Council's policy is controversial, that it is important that it is

fully accountable and the public requires the information requested to verify that the correct amount of compensation has been paid to each individual.

51. The public authority's main arguments centred on the application of the first data protection principle. It believes that disclosure of the personal data in question would be unfair and would not satisfy one of the conditions for processing listed in Schedule 2 of DPA.
52. In analysing the application of section 40(2), the Commissioner therefore considered:
 - a) whether the information in question was personal data; and
 - b) whether disclosure of the personal data under the Act would contravene the first data protection principle.

Does the withheld information constitute personal data?

53. Personal data is defined in section 1 of DPA 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 intentions of the data controller or any other person in respect of the individual.'

54. The Commissioner notes that the withheld information consists of the compensation paid to particular individuals when they sold their houses to the Council. He has no evidence to suggest that these individuals were not alive at the date of the request. He has also ensured that where the houses were owned by corporate entities this information has been disclosed too.
55. In cases where information can be anonymised to the extent that individuals may not be identified from it the Commissioner does not consider the information to be personal data. This approach is supported by paragraphs 24 and 25 of Lord Hope's judgment in the House of Lords' case of the *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*, where it was said:

"...Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection..." (para 25).
56. Firstly, the Commissioner has examined the amounts of compensation, alongside the addresses, in isolation from any additional data. He has determined that it is not possible to identify any individual from the amount of compensation alone. In

consequence of this determination the Commissioner has then considered other factors and information which might assist in the identification of any individual.

57. The Commissioner notes that there is an obligation for a new owner to register their interest at the Land Registry when acquiring a property. It is then possible to request Official Copies from the Land Registry. There may be a possibility of identifying the former owners indirectly by looking at restrictive covenants and/or easements that have been granted by them. However, the Commissioner notes that this would be uncommon. The Land Registry also provides the possibility of requesting the old deeds that precede registration. This can include transfer deeds, contracts and other items. There is a possibility that this information will enable identification of the previous owner.
58. The Land Registry also provide an option of conducting a Land Registry History Search that enables an individual (as long as the land is registered) to follow changes in ownership of land and obtain information about who was the previous owner before that land was purchased by the Council. This is the most efficient way to enable individuals to be identified and the withheld information to be linked to them in the event that it is disclosed.
59. The Commissioner has also tried searching for some of the addresses online. He notes that in a number of cases it is possible to obtain information about who the previous owner was. This would be a more cost effective way of obtaining the same information as in paragraph 58 above.
60. In conclusion, the Commissioner does not accept that the withheld information in this case can be anonymised to the extent that an individual's personal information cannot be identified from it. It therefore constitutes personal data of third party individuals.
61. As this is the case, the Commissioner must move on to consider the second criterion in relation to this exemption.

Would disclosure contravene the first data protection principle?

62. The first data protection principle provides an access threshold for personal data. It states, amongst other things, that the disclosure of the information cannot be unfair to the data subjects. The Commissioner will accordingly consider fairness.
63. It is important to note that any disclosure under the Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed this approach. In particular the Commissioner is influenced by paragraph 52 that was worded as follows: "*Disclosure under FOIA is effectively*

an unlimited disclosure to the public as a whole, without conditions” (paragraph 52):

http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf

64. The Commissioner believes that a wide fairness analysis is appropriate in this case. The important factors that require consideration are:

- *What are the reasonable expectations of each individual in relation to the handling of their personal data?*

Including:

- *What was the process through which this information was generated?*
 - *What was each person told about what would happen to their personal data?*
 - *Was consent provided at any time?*
 - *Whether the nature of the information is such that this information would be thought of as being worthy of protection?*
- *Is any duty of confidentiality owed to any person?*
 - *Whether disclosure would cause any unnecessary or unjustified damage or distress to any individual; and*
 - *Legitimate interests of the public in knowing the withheld information and understanding the Council's actions in this area. In particular the legitimate interests of the public in obtaining full transparency in this area and whether this would mitigate any expectation of privacy.*

65. When considering the reasonable expectations of the data subject, it is first necessary to understand the public authority's view about what those expectations would be. The public authority explained expectations should be linked to the process that led to compensation being awarded. It stated that the seller and the public authority discussed the opportunity for individuals to move out and that to do so may involve the payment of additional money. The public authority in all cases specifically negotiated a settlement with the seller and it was done in the climate where it would be anticipated that this specific personal financial information would be kept private. It stated that throughout the process it believed that the data subjects believed that their information would remain private. It also explained that it is possible that some compensation was awarded in direct response to the individual's personal financial and/or social circumstances. It expressed concern that the disclosure of the amounts of compensation could be connected to such personal circumstances and that this would reveal further personal information.

66. It is also necessary for the public authority to explain why it believes that these expectations would be reasonable in the circumstances of this case. It explained that using the knowledge gained through their work with the community at large, it was certain that the expectations that the information would remain private would

be reasonable in the given circumstances. It explained that the negotiations were conducted in an atmosphere where it was mutually understood that the outcome of the amount of money awarded would remain private. It explained that at no stage was consent provided by the data subject for this information to be exposed. If the data subjects wished to release the information then they would do so themselves. It explained also that a number of the individuals were vulnerable (as they may be elderly etc) and that this reinforces its arguments that their expectations are reasonable in this case. The Commissioner believes that it is correct to consider the effect disclosure would have on the actual data subjects and therefore the vulnerability of them reinforces the reasonableness of their expectations in this instance.

67. The Commissioner has considered the information itself and notes that it comments directly on the financial circumstances of the individuals. It also amounts to information that objectively would have been expected to remain private in most circumstances. He believes that the third party individuals do have a reasonable expectation of privacy in this case. The Commissioner believes that these arguments about reasonable expectations are important when considering fairness. They strongly suggest that the release of this information would be unfair.
68. The Commissioner has also considered whether the information could be said to be confidential in these circumstances. While this issue will usually be considered separately (under an analysis of section 41) should the information also be confidential then this would enhance the arguments that the disclosure of it would be unfair to the data subject (and it would also be unlawful). The public authority has explained that in its view the circumstances of its negotiations imported an obligation of confidence, although there was no specific confidentiality clause. It explained that just because the negotiations took place between the public authority and individuals, rather than between two individuals, this did not erode the expectations of confidentiality in these circumstances. The Commissioner has considered the circumstances and accepts the amounts can be regarded as confidential. He has been influenced by the judgment of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 which proposed that confidentiality would be an objective test:

“If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.”

69. He believes that in the circumstances of this case, the information has the necessary ‘quality of confidence’, was imparted in such circumstances that give rise to an obligation of confidence and that its release would be an unauthorised disclosure of information. He also notes that the requested information is not trivial and that it is not in the public domain. He believes a reasonable person would in the circumstances of this case understand the information to be confidential. The arguments about this issue also suggest that the disclosure of this information would be unfair to the data subjects.

70. The Commissioner has considered whether there are any accompanying expectations for the data subjects that lead to the argument that disclosure would be fair. He does not believe there are any such expectations in this case.
71. The public authority has also explained that it believed that the release of this information may lead to damage and/or distress for the data subjects. It explained that it was important for the Commissioner to understand that the individuals may be vulnerable; that they would not appreciate public exposure and that in their experience damage constituted a real possibility. The Commissioner must also consider the data subjects' rights under Article 8 of the Human Rights Act and has concluded that releasing the information would affect their privacy rights and would be likely to cause distress and possibly damage. This is highly persuasive and supports the position that release of this information would be unfair.
72. The Commissioner has also considered the legitimate public interest factors in this case and whether they are sufficient to outweigh the above factors. He notes that the project in the set location is controversial, that it has led to the payment of over half a million pounds in compensation and there is always a legitimate interest in ensuring accountability about large expenditure of public funds.
73. The Commissioner believes that the public interest factor in accountability for the expenditure of public funds has been mitigated by the information that has been released during the course of this investigation. He notes that the global figure of the compensation that has been paid has been disclosed and also for which properties compensation has been paid (and who those payments were made to, which can be derived through checking the land registry history as specified in paragraph 58 above). From the information disclosed, it is also possible to understand the average amount of compensation paid too. This would appear to be a proportionate approach on the facts of the case.
74. The complainant has also explained that his concerns relate to the potential erosion of the individuals' rights and that there is local concern that the individuals may have been pressurised into accepting the wrong amounts of compensation. The only way, in his view, that the public will know that the individuals have been correctly compensated would be to obtain the figures in every instance. He also referred the Commissioner to the Council's own minutes dated 28 April 2008. The Commissioner has considered these minutes and their accompanying report and believes that the relevant arguments are found in part 7 of the accompanying report.
75. It reads as follows:

HUMAN RIGHTS

7.1 The Chief Solicitor has offered advice in respect of justifying the proposals and the use of compulsory powers in the context of the Human Rights Act. The particular fundamental right that is relevant is that set out in the First Protocol, Article 1, which concerns the protection of property.

7.2 In relation to the protection of property, the relevant guidance notes that Article 1 contains three rules concerning the principle of the peaceful enjoyment of possessions, the deprivation of possessions and the right of the State to control the use of property in the general interest. It further notes that any measure that interferes with property rights must strike a fair balance between the demands of the wider community and the need to protect the individual's rights.

7.3 In considering this balance, a key considerations lies in the availability (or otherwise) of appropriate compensation. The Strasbourg Court has granted States considerable latitude as to what is an acceptable level of compensation, but it is the case that deprivation of property without compensation is acceptable only in exceptional circumstances.

7.4 In accommodating these issues the proposals within relevant master plans and supporting documents are seen to be in the public interest because they endeavour to strike the correct balance between the demands of the community and the need to protect individual's fundamental rights. They include compensation proposals that are above the minimum levels that would ultimately be required by statute, and as such are intended to be a reasonable and acceptable offer to each of the individuals concerned.

7.5 A second consideration in this context relates to Article 8 of the Human Rights Convention, which is concerned with the Right to Respect for Privacy and Family Life and has been previously used to plead where the actions of authorities interfere with individual's homes. Article 8 concerns a vast range of issues and subjects, and Cabinet should note in the light of guidance from the Department of Constitutional Affairs it is considered not to be relevant in this circumstance.'

76. In summary the Commissioner believes that there are four legitimate public interest factors that develop from these five paragraphs:
1. That the Council are seen to be accountable both for following its own report and for its development plan. The individual payments would contribute to this understanding.
 2. That the Council's administration of the programme followed its own guidance and that the internal procedure reflected the programmes objectives. This point could be explored to some extent by the disclosure of the withheld information.
 3. That the public are confident that the individuals have received compensation. Otherwise it would appear that there may be questions about the public authority's compliance with the Human Rights Act and if there are such concerns it is important that they are dealt with.
 4. Whether the difference in the amount of legal representation would intensify the three concerns above.

77. The Commissioner accepts that the four arguments above have weight. He notes that there are genuine public concerns about the project and works from the principle that openness should be promoted wherever possible. He believes that there is considerable information about the project itself and the Council's general policy with regard to it on the website. He believes that this information is readily available and can be accessed and contemplated by individuals who are interested. He has considered how the payments are audited and whether there are sufficient safeguards to address these concerns in respect of the first two points. He notes that each payment made receives considerable scrutiny through an internal audit process, an external audit processes and the National Audit Office. He is also satisfied that the disclosure of those properties that have and those that have not been associated with compensation payments has satisfied point three to some extent too. He has also analysed the withheld information itself. His view is that there are legitimate public interest factors that favour disclosure, but that the reasonable expectations and the potential detriment to the data subjects outweigh these public interest factors in the circumstances of this case.
78. To summarise, in considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subjects. The central reason for this conclusion is that the reasonable expectations of the individuals are that the information would not be provided and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
79. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.
80. As he has found that section 40(2) has been applied correctly to the amount of compensation that has been paid, he has not gone on to consider section 41(1) separately.

Procedural Requirements

81. There are a number of procedural breaches that need to be mentioned in this section of the notice.
82. The public authority failed to specify an exemption [section 40(2)] that it later relied on by the time of its internal review. This meant that it breached sections 17(1)(b) and 17(1)(c). He also finds that section 17(1) was breached as the public authority failed to apply this exemption within the statutory time limit for complying with section 1(1).
83. It also breached sections 1(1)(b) and 10(1) in failing to provide the information that was subsequently disclosed to the complainant by the time of its internal review.

The Decision

84. 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 applied the exemption found in section 40(2) to the individual amounts that it paid in compensation.

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

- It breached section 1(1)(b) in failing to provide the information it has disclosed subsequently by the time of its internal review.
- It breached section 10(1) as it failed to provide this information before the Commissioner's involvement.
- It breached sections 17(1)(b) and (c) as it failed to apply section 40(2) to the withheld information by the time of its internal review.
- It breached section 17(1) as it failed to apply section 40(2) within the statutory time limit for complying with section 1(1).

Steps Required

86. The Commissioner requires no steps to be taken.

Right of Appeal

87. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
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 17th day of February 2010

Signed

**David Smith
Deputy Commissioner and Director of Data Protection**

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

Legal Annex

Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

Section 1 provides that:

- (1) Any person making a request for information to a public authority is entitled—
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

...

Section 2 - Effect of the exemptions in Part II

Section 2 provides that:

- (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
 - (a) the provision confers absolute exemption, or
 - (b) 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 public authority holds the information,section 1(1)(a) does not apply.
- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
 - (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
 - (a) section 21,
 - (b) section 23,
 - (c) section 32,
 - (d) section 34,
 - (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
 - (f) in section 40—
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

- (g) section 41, and
- (h) section 44.

Section 10 - Time for compliance with request

Section 10 provides that:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,
- the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

...

Section 17 - Refusal of Request

Section 17 provides that:

(1) 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 provides that:

(1) 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.

(2) 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.

(3) 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] 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).

(5) 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).

(6) 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.

(7) 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 41(1) - 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 43 - Commercial interests

Section 43 provides that –

“(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exemption information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

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;

- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.