

Freedom of Information Act 2000 (Section 50)

Decision Notice

29 June 2010

Public Authority: London Borough of Barnet
Address: Corporate Governance Directorate
Building 4, North London Business Park
Oakleigh Road South
London N11 1NP

Summary

The complainant requested details of any payments made to a senior employee after he left the council. The Council refused to confirm or deny whether it held information falling within the scope of the request and cited the exemptions under section 40(5)(b)(i) and section 41(2) of the Act. The Commissioner finds that confirming or denying whether the requested information is held would disclose personal data and breach the first data protection principle. Therefore the Commissioner is satisfied that the Council correctly applied section 40(5)(b)(i) of the Act and no further steps are required. As section 40(5)(b)(i) was correctly applied there was no need for the Commissioner to consider section 41(2).

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. This is one of two cases where the complainant has requested details of any settlement package paid to a senior employee of the council. The other case is subject to a separate Decision Notice under reference FS50275041.

The Request

3. On 31 July 2009 the complainant emailed the council and stated:

'Please provide me with full details of the settlement package being given to (name redacted).

I fully expect you to refuse this request and that you will cite the Data Protection Act as the basis for so doing. However, I refer you to the Information Commissioner's Office (ICO) [Decision Notice FS50071454](#)¹ which states:

"The Commissioner recognises that there may be circumstances where it would be legitimate to release information of this nature relating to the unexpected retirement of a senior official at a public authority"

Whilst I accept that the ICO will not always agree to order such information to be disclosed, there are clearly circumstances where such disclosure is appropriate. I believe this is such a situation given (name redacted) responsibilities in respect of the council's potential Icelandic losses.

As this is a matter of public interest, perhaps the council will agree that the matter be immediately referred to the ICO for their consideration?'

4. The council responded on 30 September 2009 refusing to confirm or deny whether it held the requested information relying on sections 40(5) and 41(2) of the Act. It said the complainant could request an internal review if he was unhappy with the response. However, it added that as it had recently upheld a decision in a similar case (a reference to case mentioned in paragraph 2 above) not to confirm or deny, it said that it would have no objection if the complainant contacted the ICO direct for a decision.

¹ City and County of Swansea.

http://www.ico.gov.uk/upload/documents/decisionnotices/2006/fs50071454_dn001.pdf

The Investigation

Scope of the case

5. On 14 October 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 council's delay in responding to his information request and legitimate interests of the public in knowing whether and if so how much public money had been paid to a senior manager following their departure from the council.

Chronology

6. On 16 and 25 November 2009 the Commissioner wrote to the council confirming that it was investigating the complaint and requested details of any information in the public domain concerning any payments which may have been made to (name redacted) and consequently any reference to them in the council's annual accounts.
7. The council responded on 15 January 2010 stating that if any payments were made they would (in general terms) be fully recorded and accounted for in the annual accounts in accordance with the Statement of Recommended Practice (SORP).

Findings of fact

9. In July 2009 the council's Chief Executive, Nick Walkley, confirmed in an article in (name of publication redacted) that (name redacted) had decided to leave the council. The article quoted him as saying that 'as part of the pending restructure, (name redacted) has decided to take this opportunity to move on. (name redacted) has contributed much to the authority over the past 19 years and I wish him well in the future'.

Analysis

Procedural requirements

Section 1

10. Section 1(1) of the Act states that:

"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 10

11. Section 10(1) of the Act states that:

"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."

Section 17(1)

12. Section 17 of the Act states that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provisions 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 limit 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.

13. In this case the council took almost 2 months (from 31 July to the 30 August 2009) in which to respond to the complainant's request. By failing to state the exemption upon which it intended to rely within 20 working days it also breached section 17(1) of the Act.

Exemptions

Section 40(5)(b)(i)

14. A full text of section 40(5) may be found in the attached legal annex.

15. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:

- a. constitute a disclosure of personal data, and
- b. breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

16. The Commissioner will now address each of these points in turn.

Would confirming or denying whether the information is held reveal the personal data of the data subject?

17. Personal data is defined by section 1(1) of the DPA. It states that –

‘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 the, or 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’.

18. The complainant requested information relating to any settlement package given to a named individual at the council. The council’s response was that confirming or denying whether information falling within the scope of the request was held would disclose whether the named council employee had actually received any payment.

19. The Commissioner is satisfied that confirming or denying whether the requested information is held will reveal information regarding the circumstances under which the named individual left the council and therefore reveal their personal data. Confirming or denying would also unavoidably disclose whether any payments had been made.

Would disclosure of this personal data be unfair and in breach of the first data protection principle?

20. The council has specified that the first data protection principle in Schedule 1 Part 1 of the DPA would be breached if this personal data was disclosed.

21. Part 1 in Schedule 1 of the DPA states that personal data shall be processed fairly and lawfully and in particular shall not be processed unless at least one of the conditions in Schedule 2 is met.

22. The Commissioner has considered various factors in deciding whether disclosure of the personal data would be unfair and contravene the first data protection principle. These are set out in the confidential annex.

23. The Commissioner takes the view that in the absence of exceptional factors (e.g. fraud, maladministration or bad practice) disclosure of the circumstances under which someone leaves a public organisation is

unfair. As there are no exceptional circumstances in this case, the Commissioner's decision is that disclosure of the requested information would be unfair. The Commissioner has noted the council's statement that if any payments were made (which is not admitted) they would (in general terms) be fully recorded and accounted for in the annual accounts in accordance with the Statement of Recommended Practice (SORP). The SORP specifies the principles and practices of accounting required to prepare a Statement of Accounts which 'presents fairly' the financial position and transactions of a local authority.

24. The conclusion of the Commissioner is that the exemption from the duty to confirm or deny provided by section 40(5)(b)(i) is engaged. In making this decision the Commissioner has first concluded that confirming or denying that the requested information is held would constitute a disclosure of personal data. The Commissioner considers that it is clear that confirming or denying whether the requested information is held would disclose information that could be linked to an identifiable individual.
25. Secondly, the Commissioner concludes that disclosure of this personal data would be unfair and thus would be in breach of the first data protection principle. In making this decision, the Commissioner has balanced the lack of expectation on the part of the individual named in the request that this information would be disclosed and the potential for detriment as a result of disclosure against the arguments that the council should demonstrate transparency and accountability for any decision it may make.
26. As the Commissioner has concluded that section 40(5)(b)(i) of the Act he has not found necessary to consider the council's application of section 41(2).

The Decision

27. The Commissioner's decision is that the council responded to the request for information in accordance with the Act in that the exemption from the duty to confirm or deny provided by section 40(5)(b)(i) is engaged. However, the Commissioner finds that the council breached section 17(1) of the Act by failing to respond to the request within 20 working days.

Steps Required

28. The Commissioner requires no steps to be taken.

Right of Appeal

29. 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 29th day of June 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 40

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).”

Data Protection Act 1998

Section 1(1) provides that –

“‘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.”

The first data protection principle provides that –

“Personal data shall be processed fairly and lawfully...”