

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 05 August 2010

Public Authority: Neath Port Talbot County Borough Council
Address: Civic Centre
Port Talbot
SA13 1PJ

Summary

The complainant requested a report prepared by Counsel in relation to the "reorganisation / structure of the West Glamorgan Joint Child Care Legal Service". The public authority stated that the report was not concluded and was in draft form. Following the Commissioner's involvement in the case, the public authority subsequently stated that the report was in draft and intended for later publication. As such, the public authority stated that section 22 of the Act was engaged and that the public interest did not favour disclosure. The Commissioner finds that the public authority did not provide sufficient evidence to support its view that section 22 of the Act was engaged and accordingly orders disclosure. The Commissioner also found procedural breaches in the way the public authority handled the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 25 July 2009 the complainant submitted the following request to Neath Port Talbot County Borough Council (the "Council") under the

heading "Disclosure of Documents under the Freedom of Information Act":

"Please accept this letter as a formal request under the above Act for the disclosure of the Report prepared by [Counsel] in respect of the reorganisation / structure of the West Glamorgan Joint Child Care Legal Service: said report was completed on or about 31st May 2009."

3. On 5 August 2009 the Council wrote to the complainant and stated that:

"The report itself is not concluded as yet and is still in draft form."

4. On 5 September 2009 the complainant wrote to the Council and asked it to clarify the following points:
 - If the information was considered exempt, which exemption had the Council relied on?
 - If the information was not exempt, when would it be disclosed?

The Investigation

Scope of the case

5. On 28 September 2009 the complainant contacted the Commissioner to complain that she had received no response to her letter of 5 September 2009 and copied her letter to the Council.
6. On 19 November 2009 the Commissioner wrote to the Council to remind it of its obligations under the Act. In particular, he highlighted its obligations under section 17 of the Act (refusal of request). A copy of that letter was sent to the complainant.
7. On 19 December 2009, the complainant contacted the Commissioner to state that she had not received any further correspondence from the Council.
8. On 24 December 2009, the Commissioner wrote to the Council and the complainant to inform them that the complaint had been considered eligible for consideration under the Act.
9. On 14 January 2010 the Council wrote to the Commissioner to state that the report that the complainant sought access to was in draft format and that the report was addressed to a Board of representatives

of Local Authorities in the area. The Council stated that it has asked members of that Board for views on whether the draft could be disclosed and that it anticipated being in a position to respond by the following week.

10. On 23 March 2010 the complainant provided the Commissioner with a copy of a letter of 12 March 2010 that she had received from the Council. That letter stated that the report was in draft, that it was anticipated that it would be in its final form over the course of "the next few weeks" and that it was intended for future publication. The Council acknowledged that there was "an undoubted public interest in disclosure" but stated that it considered that "there is a countervailing interest in allowing the compilation and preparation of reports requiring investigation without premature release". The Council stated that it considered the information to be exempt under section 22(1) of the Act.
11. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The complainant clarified that she was not seeking disclosure of the names of those individuals referred to in the report.
 - The complainant also confirmed that she was not seeking disclosure of personal data contained in paragraph 10.9 of the report that would allow an individual to be identified.
12. The Commissioner's investigation therefore focused on the Council's application of section 22(1) of the Act to the remainder of the report and whether it was correct to refuse disclosure on that basis.

Chronology

13. On 30 March 2010, the Commissioner emailed the Council to ask for a copy of the withheld information and further arguments to support its application of the exemption. The Commissioner pointed out that in order to correctly rely on section 22(1) of the Act, a public authority must have had a settled intention to publish the requested information prior to the request being received. The Commissioner also highlighted that in order for the exemption to be applied, section 22(1)(c) requires that the application is "reasonable in all the circumstances" and asked the Council to explain how it concluded that its application of the exemption was a reasonable one.
14. Having received no response, the Commissioner wrote to the Council on 19 April 2010, enclosing a copy of his email of 30 March 2010 and

- explaining that he would serve an Information Notice if no response was provided.
15. On 24 April 2010 the Commissioner telephoned the Council to ascertain whether the Council intended to respond to his email and letter. The Council explained that it was drafting a response and that it would be with the Commissioner within one week. The Council stated that it might seek to rely on section 41 of the Act instead of section 22. The Council stated that its intention was to publish the report once it was completed but it was unable to confirm when that would be.
 16. Having received no response from the Council, on 11 May 2010 the Commissioner served an Information Notice on the Council requiring it to provide him with a copy of the withheld information.
 17. On 10 June 2010 the Commissioner received an email from the Council, in which it produced a copy of an email it sent to the Commissioner on 20 April 2010 attaching the withheld report. It is unclear why the original email did not reach the Commissioner or whether it did in fact reach the Commissioner but was not appropriately allocated to the relevant case. The Council did not provide any further arguments to support its application of the exemption under section 22 or any other exemption.

Analysis

Exemptions

18. The full wording of the relevant sections of the legislation is included in the attached legal annex.

Section 22 – information intended for future publication

19. Section 22 of the Act provides that information intended for future publication is exempt if the publication was planned at the time of the request and if it is reasonable for the information to be withheld until the date of publication. A publication date need not have been determined but there must be a settled intention to publish the information. This exemption is also subject to the public interest test, meaning that the information should be disclosed if the public interest favours this, even where it is clear that the exemption is engaged.
20. In order to determine whether section 22(1) is engaged the Commissioner needs to consider the following questions:

- Is the information requested held by the public authority?
 - Did the public authority have an intention to publish the information in the future when the request was submitted?
 - In all the circumstances of the case, is it 'reasonable' that information should be withheld from disclosure until the date of publication (whether that date is determined or not)?
21. The Council clarified in its responses to the complainant and the Commissioner that it held the report referred to in the request, albeit that the Council stated that the report was in draft. The Commissioner has considered the withheld report and notes that there is doubt as to whether the report is in draft form. The report is titled "Initial Management Review of Joint Childcare Team" and paragraph 1.10 clarifies that the author had expressed the report as an "initial report". There is no indication that the report is a draft. The author states that he feels it would be helpful if the Board (the representative Board referred to in paragraph 9, above) were able to consider his report, discuss the recommendations and invite him to consider any other matters it feels he had omitted, after which he would be in a position to produce a final report.
22. In any case, the Commissioner's view is that in order to demonstrate that the exemption under section 22 is engaged, a public authority must have an intention to disclose information (not documents) at a future point and that it must be able to demonstrate what information within the scope of the request it intends to publish.
23. The Commissioner notes that at paragraph 1.10 of the initial report the author asks that, if the Board agreed with his proposal to submit a final report, it would agree to the "dissemination of the key parts of it to the staff" [presumably staff of the Joint Childcare Team]. It could therefore be argued that, despite the Council's assurances to the complainant and the Commissioner that the information was intended for future publication, the intention was not to disclose the initial report in its entirety but to disclose certain "key parts" part of any final report. If this were the case then section 22(1) exemption would not be engaged because it demonstrates that the Council did not intend to publish all of the information within the scope of the request.
24. The Commissioner has concluded that in this case the Council has provided insufficient arguments to demonstrate that the exemption under section 22(1) is engaged. In particular, he has received no arguments or evidence to support the position that at the time of the request there was a settled intention to publish the initial report or to support the view that it was reasonable to withhold the information

until the date of publication. As such, he has not gone on to consider the public interest test applicable to this exemption.

25. The Commissioner acknowledges that the issue of childcare services is sensitive and that the withheld information raises some significant issues in relation to the management of the Joint Childcare Team, the staff of that team and other stakeholders. However, he may only consider the provisions of the Act when reaching his decisions on complaints brought to him and he does not consider that, in general, his role is to assume arguments on behalf of a public authority or to introduce exemptions that might be more relevant to the disputed information.

Section 41 – information provided in confidence

26. Paragraph 15, above refers to a conversation between the Council and the Commissioner in which the Council stated that it might seek to rely on section 41 of the Act (information provided in confidence). No explanation was offered for the failure to raise this argument earlier and the Commissioner has received no further correspondence from the Council in relation to this exemption. While he acknowledges that there may be third party interests in this case, having received no information to support the potential application of this exemption, the Commissioner did not consider it appropriate in this case to introduce arguments to support the exemption and has not considered this matter any further.

Section 40 – personal data

27. The complainant has clarified with the Commissioner that she is not seeking disclosure of the personal data referred to in paragraph 11, above. However, there is other information in the report that is the personal data of third parties, which could lead to the identification of those individuals. As he has a responsibility as the regulator of the Data Protection Act 1998 (the "DPA") to ensure that personal data is properly processed, the Commissioner has considered whether it would be appropriate to disclose that personal data. He has therefore considered the exemption under section 40(2) of the Act. This may appear to contradict the approach set out in paragraph 26, above, but the Commissioner has a duty to ensure that personal data is properly processed.

Does the report contain personal data?

28. 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.'*

29. The personal data contained within the report that is not outside the scope of the request, is in the form of job titles and comments received about individuals that would allow them to be identified, although no actual names are included. The job titles fall into two categories; the first is job titles of posts held by only one individual and the second job titles of posts held by more than one person.
30. Clearly where only one individual holds a post, individuals within the public authority and other stakeholders would be able to easily identify those individuals by reference to the job title, and so the Commissioner considers this to be personal data. His view is that it would be more difficult to identify individuals by reference to job titles where two or more people hold such posts. However, the Commissioner is not aware of the level of information that is already in the public domain and he considers it appropriate to err on the side of caution in this case and assume that it would be possible to identify, by reference to job title, all individuals within the Joint Childcare Team.
31. The Commissioner also considers that comments received about individual members of the team – for example, comments about a single individual who holds a particular job title – could be considered to be their personal data, as they fall within the definition of personal data (“any expression of opinion...”) referred to in paragraph 29, above.

Would disclosure breach any of the data protection principles?

32. As the Commissioner is satisfied that the references to job titles and comments about individuals in the withheld report can be considered to be personal data, the next question for him to consider is whether disclosure of the information would breach any of the data protection principles.
33. As the Commissioner received no arguments from the Council in relation to this exemption he has considered only the data protection principles that he feels relevant to this case.

The First Data Protection Principle

34. The Commissioner considers the first data protection principle to be most relevant in this case. It states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

Fairness

35. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individuals. He has then balanced against these the general principles of accountability, transparency and legitimate public interest.
36. The Commissioner considers it unlikely that individuals would expect their personal data contained in the withheld information to be published into the public domain. However, references to job titles and comments about individuals in the report relate, in general, to the structure and effectiveness of the department, and not to a post-holder’s private or personal life. Furthermore, where the report makes reference to comments received about individuals they tend to be complimentary. As such, the Commissioner does not consider that the disclosure of the personal data would have negative consequences.
37. The Commissioner believes there is a legitimate public interest in disclosure of information which would promote accountability and transparency in the spending of public money. He also believes that there is a legitimate public interest in knowing how public authorities are structured, how departments function and how they might be restructured to increase effectiveness. While the disclosure of job titles and other comments on individuals are not essential to meet this legitimate interest, they assist in putting the report into context.
38. The Commissioner has weighed the nature of the expectations and the consequences of disclosure in this case against the legitimate public interest in disclosure and considers that releasing the references to job titles would not be unfair.

Schedule 2 Condition 6 of the DPA

39. There are six conditions in Schedule 2 of the DPA, but only condition 1 (consent) or condition 6 (legitimate interests) would usually be relevant to disclosures under the Act. The Commissioner considers that the relevant condition in Schedule 2 in this particular case is the sixth condition. This condition states that:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.

40. The Commissioner’s awareness guidance on section 40¹ states that following the Information Tribunal decision in *Corporate Officer of the House of Commons v Information Commissioner and Leapman, Brooke and Thomas* (EA/2007/0060 etc.; 26 February 2008) public authorities should approach condition 6 as a three-part test:

- there must be a legitimate public interest in disclosure;
- the disclosure must be necessary to meet that public interest; and
- the disclosure must not cause unwarranted harm to the interests of the individual.

41. As stated above at paragraph 37, the Commissioner considers there to be a legitimate public interest in the disclosure of information that promotes accountability and transparency in either the spending of public money or that impacts on the business of an organisation, its employees or other stakeholders. The Commissioner considers that disclosure of the personal information contained in the report is necessary to satisfy this public interest.

42. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. The Commissioner accepts that the data subjects would not necessarily have had any expectation that their personal data would be disclosed into the public domain. However, given the fact that the information relates to the individuals’ public life (i.e. their role as public employees), he does not consider that any prejudice would arise for

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

the individuals concerned. He therefore maintains that disclosure would not represent an unwarranted interference into the individuals' private lives

43. On balance, the Commissioner accepts that disclosure of the personal data would be necessary for a legitimate interest of the public and considers that this outweighs any prejudice that might be caused to the individuals' own rights, freedoms and legitimate interests.

Lawfulness

44. In the context of freedom of information requests, the Commissioner considers it is likely that it will be unlawful to disclose personal information where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence. In this case he has seen no evidence that any of these breaches would occur, and as a consequence he has concluded that disclosure would not be unlawful.
45. For the reasons set out above, the Commissioner is satisfied that disclosure of the personal data in this case would be neither unfair nor unlawful, and therefore disclosure would not breach the first data protection principle.

Procedural Requirements

46. Section 1(1)(a) of the Act provides that any person making a request for information to a public authority is entitled to be informed in writing by that public authority whether it holds the requested information. Section 1(1)(b) provides that, if the information is held (and is not exempt), the applicant has the right to be provided with that information. The Commissioner finds that by failing to provide the complainant with the requested information the Council breached section 1(1)(b).
47. Section 10(1) of the Act states that a public authority must comply with section 1(1)(b) "not later than the twentieth working day following the date of receipt" of the request. By failing to disclose the requested information within the statutory timescale the Council breached section 10(1).
48. The Council's refusal of the request of 5 August 2010 did not cite the exemption upon which it was relying or explain why the exemption was applicable. The Commissioner therefore finds that the Council breached sections 17(1)(b) and (c) of the Act. In its refusal of the request the Council did not provide the complainant with particulars of its complaints procedure or her rights under section 50 of the Act. The

Commissioner therefore finds that the Council breached section 17(7)(a) and (b) of the Act.

The Decision

49. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act, in that it incorrectly applied the exemption at section 22(1).
50. The Commissioner has also found procedural breaches of sections 1(1)(b), 10(1), 17(1)(b) and (c), and 17(7)(a) and (b).

Steps Required

51. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:
 - Disclose the withheld report, subject to the redaction of personal data referred to in paragraph 11, above.
52. The public authority must take the step required by this notice within 35 calendar days of the date of this notice.

Failure to comply

53. Failure to comply with the step described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

54. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
55. The request to the Council of 25 July 2009 clearly indicated that it had been made under the provisions of the Act, yet the Council appears not to have recognised it as such and this resulted in an inadequate refusal

notice. The Commissioner would expect public authorities to be able to recognise requests for information and handle them in accordance with the legislation.

56. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit time scale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. On 5 September 2009, the complainant asked the Council to clarify its response to her request and the Commissioner considers that this should have been recognised as a complaint about the way in which her request had been handled. The Commissioner therefore expresses his concern that it took 6 months for an internal review to be completed in this case.

Right of Appeal

57. 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 05th day of August 2010

Signed

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

Legal Annex

General Right of Access

Section 1(1) provides 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."

Time for Compliance

Section 10(1) provides 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."

Refusal of Request

Section 17(1) provides that -

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

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

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

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

Section 17(4) provides that -

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

Section 17(5) provides that –

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

Section 17(6) provides that –

"Subsection (5) does not apply where –

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

Section 17(7) provides that –

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

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

Information intended for future publication

Section 22(1) provides that –

"Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

Personal information

Section 40(1) provides that –

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

Section 40(2) provides that –

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

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

Section 40(3) provides that –

“The first condition is-

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

Section 40(4) provides that –

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

Section 40(5) provides that –

“The duty to confirm or deny-

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

Section 40(6) provides that –

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

Section 40(7) provides that –

In this section-

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

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

Information provided in confidence.

Section 41(1) provides that –

"Information is exempt information if-

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

Section 41(2) provides that –

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