

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 30 June 2010**

**Public Authority:** Bexley Council  
**Address:** Bexley Civic Offices  
Broadway  
Bexleyheath  
Kent  
DA6 7LB

### Summary

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Following the publication of a report by Bexley Council (the "Council") into the use of a purchasing card by a former Leader, the complainant requested information relating to the monitoring of the card. As part of its response, the Council provided copies of a series of emails exchanged between Council employees. However, the Council redacted certain details in the emails, claiming that because this information constituted personal data and disclosure would be unfair to those individuals concerned, section 40(2) of the Freedom of Information Act 2000 would apply. The Commissioner finds that the release of the redacted information would breach the first data protection principle. The exemption provided by section 40(2) is therefore engaged and the Council is not required to take any steps. The Commissioner, however, has determined that the Council breached section 17(1) in its processing of the request.

### The Commissioner's Role

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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

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2. On 10 August 2009, an Audit Committee at Bexley Council (the "Council") presented the findings of an internal audit report into the use of a corporate purchasing card by a former Leader at the authority following questions of impropriety.
3. The auditors who authored the report found no evidence of fraud in the purchasing activities. However, they considered that on some occasions the card had been used in contravention of Council rules. The report therefore recommended that the Council seek to recover the funds that had been inappropriately claimed.
4. As part of its analysis, the report also noted that, at the time that the investigation took place, it had become apparent that concerns had been raised in connection with the former Leader's use of a purchasing card at another authority.

## The Request

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5. On 3 September 2009, the complainant submitted the following information request to the Council:
  1. *"In regards to the Audit Committee 10<sup>th</sup> August Supplementary Report on the use of a Purchasing Card by [the former Leader]. I wish to know who authorised (name and/or grade) the change of monitoring of the card from Systems Administrator, Line Manager, Audit, to a PA and a Finance Team, and at what date did this change take place, also who were the Finance Team (names and/or grades)."*
  2. *"Further I would like to have copies of all correspondence and memo's etc. that relate to the monitoring of the Purchasing Card used 1/7/2007 to 4/5/2008."*
6. The Council responded to the request on 1 October 2009. In regards to part 1 of the request, the Council offered that there *"was no change in the monitoring process as the system was set up to replicate that already in place for Officers of the Council."*
7. Turning to the second part of the request, the Council provided all the relevant memorandums, emails and correspondence which referred to the setting up, monitoring and coding of the card and its transactions.

The Council, however, redacted certain details, including the names of any listed employees, on the grounds that it would infringe the data-subjects' right to privacy.

8. The complainant contacted the Council on 3 November to request that it review its decision to redact the names of employees referred to in the records he had received. The Council responded with the outcome of its internal review on 16 November 2009. This upheld its decision to redact the information. It also clarified that it had based its refusal on section 40(2) of the Act, considering that disclosure would be unfair and unwarranted.

## The Investigation

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### Scope of the case

9. On 25 November 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:

*"I believe that if the Monitoring team had disclosed the fact that a card was being mis-used, and had withdrawn the card, the subsequent investigation, that cost the tax-payer thousands of pounds (72 working days at Managerial pay scales) would not have been necessary, therefore the people that failed in their duty to expose the mis-use, should be brought to account, without the names this will not happen."*

10. In referring his complaint, the complainant has only asked the Commissioner to consider whether the Council was correct to redact information in the records it had provided to him. The Commissioner has therefore only considered part 2 of the original request of 3 September 2009.

### Chronology

11. On 2 December 2009, the Commissioner wrote to the Council to advise it of his involvement in the case. The Council responded on 30 December 2009 by providing copies of the withheld information.
12. The Commissioner wrote to the Council on 28 January 2010 to set out his initial views regarding the case. The Council replied on 26 February 2010 by giving what it viewed to be the pertinent background to the use of the purchasing card by the former Leader. It also set out in

greater detail the reasons why it considered that the tests for disclosure under section 40(2), by way of the first data protection principle, could not be satisfied.

13. On 19 March 2010, the Commissioner asked the Council to provide further information relating to the roles of the employees whose personal data had been redacted. To answer the request, the Council provided copies of relevant structure charts and job descriptions. It also enclosed a copy of the report presented to the audit committee on 10 August 2009.

### **Findings of Fact**

14. The information provided to the complainant in response to part 2 of his request consists of 14 emails and 3 letters, ranging from 2 August 2007 to 26 June 2008. When releasing these documents, the Council redacted names and signatures of employees, as well as the employees' respective contact details such as telephone numbers and email addresses. In addition, the Council has sought to withhold information that would disclose the cheque numbers relating to payments made by the former Leader of the Council.

### **Analysis**

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#### **Exemptions**

##### **Section 40(2) – third party personal data**

15. Section 40(2) of the Act (the full wording of which is included in the legal annex, as are all sections referred to in this notice) provides an exemption to the right to access recorded information where it is the personal data of any third party. So far as is relevant to this case, in order for a public authority to rely on section 40(2) it would have to be satisfied that:
  - the requested information was the personal data of a data-subject; and
  - disclosure of that information would contravene a data protection principle contained in the Data Protection Act 1998 (DPA).

##### **Is the requested information personal data?**

16. In considering whether section 40(2) applies, the Commissioner has made the following distinction in regards to the withheld information:

- Identification records – this would include names and signatures of employees included in the requested records and any contact information, such as telephone numbers and email addresses.
  - Cheque numbers – details of the personal cheque numbers that the former Leader had used to reimburse costs incorrectly claimed on the purchasing card.
17. 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”*
18. When considering whether the information is personal data, the Commissioner has referred to his own published guidance entitled “Determining what is personal data”<sup>1</sup>. This sets out two questions which, if answered in the affirmative, will decide whether information constitutes personal data:
- (i) Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?
  - (ii) Does the data ‘relate to’ the identifiable living individual, whether in personal or family life, business or profession?
19. Regarding the identification records, the Commissioner has no doubt that the information, either by itself or in conjunction with other publicly available information, would identify a living individual. In addition, this data would relate to the individuals in a significant sense. As both questions can therefore be satisfied, the Commissioner considers the information to constitute personal data.
20. Turning to the cheque numbers, the Commissioner has considered whether a living individual can be identified from that data in the event

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf)

that the information is disclosed to the public. In this case, the communications in which the cheque numbers are embedded, and which have already been disclosed, clearly indicate that the cheques relate to the former Leader. Given then that this information evidently relates to the former Leader, the Commissioner accepts that it would also constitute personal data.

21. As shown above, the Commissioner has determined that the requested information would constitute personal data. However, having considered the nature of the information, the Commissioner is satisfied that it does not constitute sensitive personal data for the purposes of the DPA.

**Would disclosure contravene a data protection principle?**

22. The public authority has argued that the release of the requested information would breach the first data protection principle. This principle states:

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

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*

23. All the relevant requirements of the first data protection principle must be satisfied to ensure compliance with the DPA. If even one requirement cannot be met, disclosure will not be in accordance with the first data protection principle and therefore the DPA. The Commissioner’s considerations here focus on the general issue of whether disclosure of the requested information would be fair.

*Fairness*

24. In establishing whether disclosure is fair, the Commissioner has looked to balance the consequences of any release of personal data and the reasonable expectations of the data subject with general principles of accountability and transparency.
25. The Commissioner has considered the competing interests of transparency and privacy by bearing in mind the following factors:
  - The consequences of disclosure
  - The data-subject’s reasonable expectations of what would happen to their personal data

- The balance between the rights and freedoms of the data subject and the legitimate interests of the public
26. As they would seem to attract different considerations, the Commissioner has addressed the identification records and cheque numbers separately.

*Identification records*

27. In this case, it is not clear that the disclosure of the requested information would be likely to cause any employee harm or subject him to threats or harassment. However, the Commissioner recognises that the direction of the request is specifically aimed at those individuals who had seemingly been charged with overseeing the former Leader's use of a purchasing card. Therefore, the Commissioner considers as valid the Council's concerns that disclosure could place the employees in the potentially invidious position of being unjustly connected, and presumably blamed, for the card's misuse.
28. In addition, the Commissioner has been informed by the Council that the employees have all expressed a strong opposition to having their personal data disclosed. While this preference will not necessarily prevent disclosure, the Commissioner considers that it may carry some weight as evidence of their reasonable expectations.
29. Nevertheless, the Commissioner has no doubt that at least some of the employees concerned would be aware that their actions would be subject to a significant level of scrutiny.
30. In the Commissioner's guidance on the application of section 40, entitled "*The Exemption for Personal Information*"<sup>2</sup>, he has suggested what information a data-subject may expect to have disclosed about them. An important principle rests on the distinction made between:

*"Whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances). Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position, and whether they have a public-facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be*

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<sup>2</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf)

*disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (e.g. the official's family)."*

31. The redacted identification records all form part of communications that were exchanged in a strictly work capacity. Furthermore, the Commissioner is aware that at least three of the employees concerned have significant managerial roles within the authority. They would therefore be responsible for making influential decisions in the operating of their team or department. In view of the combination of these factors, the Commissioner considers that, typically, there would be a strong case for arguing that at least some of the employees would have a reasonable expectation that the information could be disclosed.
32. The Commissioner would also accept that there is a legitimate public interest in knowing what monitoring took place of a purchasing card that was later found to be used incorrectly. Furthermore, disclosure of the employees who were involved in the monitoring process could help ensure that a level of public accountability was secured.
33. However, when balancing up the competing interests of transparency and privacy, the Commissioner has found it necessary to refer to the report presented to the Council on 10 August 2009. As part of their findings, the authors identified a number of shortcomings in the mechanism by which the purchasing card was checked and controlled:  
  
*"2.6 The purchasing card checking and authorisation process for the Leader was not robust enough. Relatively junior staff were tasked with checking the transactions and undertaking a monitoring role which was not clearly explained to them. There was a lack of clarity over the intended use of the card, and staff did not feel it was their role to question the authority and judgment of the Leader in its use, although they did raise personal items of expenditure with [the former Leader], which have been repaid."*
34. As evidenced, the report did not find fault with the individual employees listed in the emails. Instead, it strove to criticise the lack of planning by senior officials to ensure that a well-structured auditing system was put in place that clearly designated the roles and responsibilities of those individuals chosen to review transactions.
35. By disclosing the substantive content of the emails in question, the Commissioner believes that the Council has provided the public with an opportunity to understand what monitoring took place of the former Leader's purchasing card. The Commissioner does not therefore believe that the disclosure of information identifying the employees would add anything to the debate around this issue, but may instead serve to



scapegoat individuals who had not been apportioned any blame in the Council's investigation of this affair.

36. Ultimately, the Commissioner considers that the Council has struck a correct balance between the legitimate interest of the public in understanding how public funds may have been mishandled and an employee's right to privacy. The Commissioner therefore believes that, as disclosure would skew this balance to the detriment of the data-subjects, the release of the information would not be fair.

*Cheque numbers*

37. To quote the internal audit report produced by the Council:

*"5.3 The Council's Purchasing Card Statement of Use, signed by [the former Leader], is clear that personal expenditure is not permitted; [the former Leader] did utilise the card for such expenditure, although all amounts considered to be such were settled by him after card statements were received."*

38. As part of the communications provided to the complainant by the Council, references are made to the settlement of costs referred to in the above quote, including the amounts being reimbursed. However, the Council has chosen to redact the personal cheque numbers that the former Leader used to make the payments.
39. When weighing whether the disclosure of the cheque numbers would be fair, the Commissioner has been steered by the distinction set out at paragraph 30, which stressed that *"Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity."*
40. In this case, it is clear that the payments made by the former Leader relate to his functions in an official capacity. However, the Commissioner similarly recognises that the cheques themselves are attached to a personal account.
41. To disclose the cheque numbers would therefore move from releasing information about the employment of the former Leader to releasing information relating to the personal finances of the former Leader. Irrespective of the criticism of the former Leader in his use of the purchasing card, the Commissioner would consider that private information deserves a high level of protection.
42. The Commissioner is particularly mindful that the disclosure of the cheque numbers would not serve to address any concerns the public

may have about the way the Council operates. It would, however, represent an unwarranted intrusion into the private life of the data-subject and could expose his personal bank account to risk.

43. The Commissioner has therefore determined that to release the cheque numbers would be unfair and, accordingly, would breach the first data protection principle.

## **Procedural Matters**

### **Section 17 – refusing a request**

44. Section 17(1) requires that, where a public authority wishes to rely on any exemption from part II of the Act, it should issue a notice specifying the exemption and stating why the exemption would apply. In accordance with section 10(1) of the Act, this notice must be issued within 20 working days of receipt of the request.
45. By failing to identify an exemption in its initial response, the Commissioner considers that the Council did not provide an appropriate refusal notice. He therefore finds that the Council breached section 17(1) of the Act.

## **The Decision**

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46. The Commissioner's decision is that the public authority correctly applied section 40(2) of the Act to the requested information.
47. However, the Commissioner finds that the public authority breached section 17(1) of the Act by failing to cite the relevant exemption it was relying on within the statutory time-limit.

## **Steps Required**

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48. The Commissioner requires no steps to be taken.

## Right of Appeal

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49. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 30<sup>th</sup> 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**

#### **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 the fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

#### **Personal Information**

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.

## **The Data Protection Act 1998**

### **Interpretative provisions**

Section 1(1) provides –

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

“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.

Section 1(2) provides –

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.

Section 1(3) provides –

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 operation 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.

Section 1(4) provides –

Where personal data are processed only for the 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.

Section 2 provides –

In this Act “sensitive personal data” means personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, such as the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1

The Data Protection Principles

1. 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.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
4. Personal data shall be accurate and, where necessary, kept up to date.
5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.