

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 June 2011

Public Authority: Brean Parish Council
Address: Brean Post Office and Stores
Church Road
Brean
Somerset
TA8 2SF

Summary

The complainant asked for information relating to the terms and conditions of contracts placed by the Parish Council for various concessions. The Parish Council disclosed some of the information requested but withheld other information citing section 43(2) of the Act. The Commissioner's decision in this case is that the withheld information is personal data and therefore the Commissioner, mindful of his role as the data protection regulator, has gone on to proactively apply section 40(2) to the withheld information and decided that disclosure of any of it would be unfair. The Commissioner has also recorded a procedural breach of section 17(3) in relation to the Parish Council's handling of this 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 12 December 2009, the complainant, on behalf of Brean Householders Group, requested information relating to the terms and conditions of contracts placed by Brean Parish Council (the Parish Council) for various concessions operating on Brean beach. In particular, with regards to the car parking concession, the complainant wanted details of the numbers of paying cars that used the beach throughout the year.
3. On 17 December 2009, the Parish Council responded by providing a copy of the 'draft' agreement used for all concessions and confirming that a rent agreement was in existence for the car park concession which provided the Parish Council with a fixed guaranteed income. The Parish Council also confirmed that details on the number of paying vehicles that used the beach throughout the year was not held.
4. On 18 December 2009, the complainant wrote to the Parish Council clarifying that the information sought was the detail of each individual concession including car parking and all the agreed financial terms. The complainant explained that it had made enquiries to Sedgemoor District Council regarding its entitlement to access such financial details under Freedom of Information and the District Council had confirmed that access to this information should be granted.
5. On 29 December 2009, the Parish Council responded to the complainant stating that perhaps he had misunderstood the District Council's advice regarding entitlement to the detailed requested information as it was commercially sensitive and therefore exempt under section 43(2) of the Act. The Parish Council confirmed that it was refusing to provide this information as disclosure would prejudice the commercial interests of the concessions.
6. On 10 January 2010, the complainant wrote again to the Parish Council clarifying that the request was not for financial information relating to the concessions during the bidding process as he agreed that this would be commercially sensitive information. Rather the complainant was seeking information on contractual agreements that were already agreed or in operation. In view of this, the complainant

requested an internal review of the original decision not to disclose.

7. The Parish Council provided its internal review response on 4 February 2010 and the review upheld the original decision not to disclose the requested information.

The Investigation

Scope of the case

8. On 13 March 2010, the complainant contacted the Commissioner to complain about the way his request for information had been refused. Specifically the complainant did not agree that the exemption at section 43(2) of the Act was applicable as the request was for information about contract terms, including financial terms, that were currently in place i.e. no longer in negotiation and thus was no longer commercially confidential.
9. Accordingly the scope of the Commissioner's investigation has focussed on the Parish Council's handling of the request and the application of the exemption claimed.
10. Although not cited by the Parish Council, the Commissioner has also considered whether the withheld information is personal data and therefore whether section 40(2) of the Act was applicable.
11. The complainant was also of the view that the Parish Council had intentionally inaccurately represented his request to support the Council's position. The Commissioner has reviewed this aspect of the complaint and found no evidence to suggest this was the case.
12. The Commissioner notes that there has been extensive correspondence between the complainant and the Parish Council, some of which has contained additional requests for information. However the scope of this investigation will be confined to the handling of the request for information relating to concessions as this was the actual complaint made to the Commissioner.

Chronology

13. On 7 September 2010, the Commissioner wrote to the Parish Council and asked for its representations regarding withholding the requested information. In particular clarification was sought as to how release of this information would prejudice the commercial interests of both the Parish Council and the concessions. The Commissioner also asked for details of any representations received from the concessions, in order to demonstrate the level and likelihood of prejudice that would be caused by disclosure, together with the Parish Council's public interest arguments.
14. The Parish Council responded to the Commissioner on 10 October 2010 clarifying its arguments for non-disclosure and enclosing a copy of the agreement in relation to the car parking concession. The Parish Council highlighted the penultimate paragraph in the agreement regarding confidentiality - which the Commissioner notes was a standard sentence stating "*the details of this concession shall remain confidential on both sides*". This sentence does not necessarily mean that the agreement should be treated as confidential but is an indicator that the Parish Council considered it to be confidential information.
15. The Parish Council again confirmed that it did not hold information in relation to the number of cars paying for entrance to the beach.
16. In relation to the public interest, the Parish Council stated that it had 'nothing to add to the public interest matter'.
17. The Commissioner wrote to the Parish Council requesting further details on all the concessions falling within the scope of the complaint's request and was provided with the remaining agreements. The Parish Council advised that at the time of signing the agreements, it had agreed verbally with each of the concession holders not to disclose details of the value to each concession as it could adversely affect their commercial interests.
18. During the course of the investigation the Commissioner also made enquiries of the Parish Council in order to establish whether the concessions were operated by sole traders and therefore whether section 40(2) was applicable. The Parish Council has confirmed that all the concessions were operated by sole traders.

Analysis

Exemptions

Section 40(2) – personal data of third parties

19. Section 40(2) of the Act provides an exemption for information which is the personal data of any individual other than the applicant. This provision creates an absolute exemption (one not subject to the public interest test) for information falling within the definition of personal data as set out in schedule 1 of the Data Protection Act 1998 (the DPA).
20. "Personal data" is defined at section 1(1) of the DPA as:
 - "data which relates 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.
21. Personal data is exempt if either of the conditions set out in section 40(3) or 40(4) are met. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the data protection principles as set out in Schedule 1 to the DPA.
22. The information being withheld by the Parish Council consists of four beach licence agreements (concessions) comprising of ice cream, pony rides, refreshments and car parking concessions. Each concession agreement contains the details of the concession holder and the terms (including financial terms) and conditions of each concession. The Commissioner is satisfied from information provided by the Parish Council that the concession holders operate as sole traders. As such the Commissioner considers that information about the business activities of a sole trader constitutes personal data because these activities are intrinsically linked and may impact on their private lives. He is satisfied that the withheld information falls within the definition of personal data as set out in the DPA. It contains information about living individuals who it would be possible to directly identify from those data. The concession holders operate on a relatively small section of beach and are generally well known in the local community.

The Commissioner considers that information, including financial information identifying the amount a particular concession pays the Parish Council would immediately identify specific individuals within that community. Therefore the Commissioner is satisfied that the exemption under section 40(2) is engaged in relation to the withheld information.

Would disclosure breach the first data protection principle?

23. The Commissioner has considered whether disclosure of the withheld information would be unfair, and would thus breach the first data protection principle which 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.”

24. The Commissioner's guidance on section 40 notes that the concept of fairness is not easy to define. However the guidance suggests the sort of issues which should be considered when establishing whether it would be unfair to pass on information without the consent of the data subject would include:

- Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
- Would the third party expect that his or her information might be disclosed to others?
- Has the person been led to believe that his or her information would be kept secret?

25. The Parish Council has explained that at the time of signing the concession licence agreements, the Parish Council agreed verbally with the concession holders not to disclose the detail of the value of the concessions. The Parish Council considers that this information was provided with an explicit assurance to the concession holders that any financial information provided would be treated confidentially.

26. The Commissioner considers that in this case the information contained within the concession licence agreements clearly relates to concession holders as it includes their names and addresses along with the details of their financial arrangements with the Parish Council. Whilst the Commissioner would expect that the identity of most if not all of the concession holders would be known within the local parish, details of their financial dealings with the Council would not be known. Several of those concession holders contacted have made it clear to the Commissioner that they do not wish their financial dealings to be made the subject of public scrutiny. The Commissioner considers that the withheld information in this case would not assist the public in such scrutiny, but would be contrary to the expectations of the individuals concerned. Further, given the sensitive nature of the information, the Commissioner believes that its release into the wider public domain would be likely to cause considerable distress to all concerned.
27. However, notwithstanding the data subjects' reasonable expectations or any damage or distress caused to them by disclosure, the Commissioner considers it may still be fair to disclose personal data if it can be argued that the legitimate interest in the public accessing the material is compelling. Therefore, when assessing fairness the Commissioner will also balance the rights and freedoms of the data subject with the legitimate interests in disclosing the information into the public domain.
28. The Commissioner has considered whether there is a legitimate interest in the public accessing the withheld information and notes that the complainant in this case is representing a householders group with interests in holding the Parish Council to account. The Commissioner accepts there is a wider public interest in transparency of public sector organisations, also a more specific public interest in understanding the processes unpinning how commercial tourism related concessions are awarded. Those interests would be served by disclosure of the withheld information. However, the Commissioner does not consider that any legitimate interest in the public accessing the withheld information would outweigh the potential damage and distress to individuals caused by disclosure of that information. Therefore the Commissioner is unable to conclude that disclosure of the withheld information is necessary to meet a legitimate public interest rather than a personal interest.

29. In view of all of the above, the Commissioner is satisfied that the withheld information is personal data and that disclosure of any of it would breach the first data protection principle as it would be unfair.
30. As the Commissioner has decided that disclosure would be unfair, there is no need for him to go on to consider the other elements of the first data protection principle.

Section 43(2) – Prejudice to commercial interests

31. As the Commissioner has decided that the information requested is exempt by virtue of section 40 (2) he has not gone on to consider the application of section 43 (2).

Procedural Requirements

Section 17(3) – refusal notice

32. Section 17(3)(b) provides that, where a public authority is relying on an exemption to withhold certain information, it must either in the refusal notice, or in a separate notice, state the reasons for claiming that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner notes that in this case the public authority did not advise the complainant that it had considered the public interest test in either the initial refusal stage or at internal review as required under the Act.
33. In failing to advise the complainant that it had considered the public interest in relation to its application of section 43 (2), the Commissioner finds that the Council breached the requirements of section 17(3)(b) of the Act.

The Decision

34. The Commissioner's decision is that the withheld information is exempt under section 40 (2) of the Act because it constitutes the personal data of the concession holders and disclosure would breach the first data protection principle.
35. The Commissioner does however consider that the Parish Council breached section 17(3)(b) of the Act in that it failed to

advise the complainant that it had considered the public interest in relation to its application of section 43 (2).

Steps Required

36. The Commissioner requires no steps to be taken.

Right of Appeal

37. 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

38. 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.
39. 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 23rd day of June 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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."

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."

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)."