

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 January 2011

Public Authority: Her Majesty's Courts Service (an executive agency of The Ministry of Justice)
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant asked Her Majesty's Courts Service (the "public authority") to provide information relating to the job interview of a third party. The public authority refused to disclose this using the exemption under sections 40(2) of the Freedom of Information Act 2000 (the "Act").

The Commissioner considers that section 40(2) by virtue of 40(3)(a)(i) was correctly applied in this case and that disclosure would breach the Data Protection Act 1998 (the "DPA"). The Commissioner requires no steps to be taken. The complaint is not upheld.

The public authority's handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

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. The complainant is an employee of the public authority. He was an unsuccessful candidate in an internal application for promotion, for

which he and one other party were interviewed. He was unhappy with the outcome and considered raising a grievance, which subsequently he did. He has requested access to information about the scoring of the other party's interview.

The request

3. The Commissioner notes that under the Act Her Majesty's Courts Service is not a public authority itself, but is an executive agency of The Ministry of Justice. Therefore, the public authority in this case is actually The Ministry of Justice not Her Majesty's Courts Service. However, for the sake of clarity, this decision notice refers to Her Majesty's Courts Service as if it were the public authority.
4. The Commissioner notes that the complainant is an employee of the public authority who was originally seeking information for his personal use in a potential grievance. Consequently, there has been much previous correspondence in this case. Throughout his earlier correspondence with the public authority, the complainant headed his emails as being "*strictly confidential*" and "*strictly private and confidential*". Accordingly, the Commissioner understands that the public authority did not deal with this earlier correspondence under the terms of the Act, but rather in a 'business as usual' manner, i.e. an employer dealing with its employee. In the circumstances the Commissioner considers that this was an appropriate way in which to correspond with the complainant.
5. It became apparent that the complainant remained unhappy and he confirmed that he was raising a grievance. Therefore, on 8 February 2010, the public authority invited him to make a formal request under the terms of the Act and advised him of its appropriate contact point. When it received further correspondence from the complainant on 16 February 2010 it advised the complainant that it would be dealing with this under the terms of the Act. The Commissioner therefore considers the date of 16 February 2010 as being the original request date.
6. The Commissioner considers that the request for information can be summarised as the following:

"I also request disclosure of which scores relate to named panel members, a copy of [name removed]'s scores together with the written recorded notes pertaining to both of our 'presentations' and our answers to the five questions asked to include information of any 'evidence' [name removed] produced to

corroborate or support what he said to the panel. I trust that there will be no difficulty with acceding to my request which is made under the principle of transparency."

(This is taken from the wording within some of the complainant's earlier correspondence with the public authority).

7. On 6 April 2010 the public authority sent out a refusal notice under the terms of the Act. It continued to withhold the requested information stating that it was exempt under section 40(2) of the Act.
8. On 12 April 2010 the complainant asked for an internal review of the decision not to release the scores and notes appertaining to the successful candidate.
9. On 7 May 2010 the MOJ responded on behalf of the public authority. It upheld the earlier position that the information was exempt by virtue of section 40(2), and that disclosure would breach the data protection principles and that it would also be likely to cause unwarranted damage or distress. It further commented that:

"Since you know the identity of the other candidate for the post it is not possible to anonymise the interview notes and scores".

The investigation

Scope of the case

10. On 1 July 2010 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 whether disclosure would breach the Data Protection Act 1998 (DPA).
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

12. On 15 November 2010 the Commissioner wrote to the complainant. He drew the complainant's attention to a decision which he had recently made regarding the Department of Finance and Personnel (Northern

Ireland)¹ in which the complainant had asked for information about parties who had been short-listed for an interview. The Commissioner considers the information sought in this earlier case to be substantially similar to the information requested in this case.

13. The Commissioner advised the complainant that he was likely to draw the same conclusions as in this previous case and invited him to withdraw his complaint. The complainant advised that he still required the Commissioner to make a decision.

Analysis

Exemptions

Section 40(2) – personal data of third parties

14. Section 40(2) of the Act (see Legal Annex) is an exemption which relates to the personal information of individuals 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 contained in section 1(1) of the DPA.

15. Personal data is defined in section 1(1) of the DPA as:

“data which relate to a living individual who can be identified...from those data, or...from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.”

16. 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.
17. The public authority applied the exemption under section 40(2) to the withheld information, which was information relating to the interview scores and notes of one known applicant for a specific post. It explained that it believed disclosure would breach the first data protection principle in that it would be unfair and the party would have a reasonable expectation that such information would be held ‘in confidence’.

¹http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50242593.ashx

18. The Commissioner is satisfied that all of the withheld information falls within the definition of personal data as set out in the DPA. It contains information about a living individual who can clearly be identified by the complainant. The information is about an individual being interviewed for a specific post and evidence they provided of their experience relevant to that post under the specified essential criterion. The Commissioner believes that, even if the applicant's name were redacted, their identity would be clear to others such as fellow employees and the complainant himself.
19. The complainant has already been directed to one of the Commissioner's earlier decisions, as shown at paragraph 11 above. For the same reasons identified in this earlier decision, 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.

Procedural requirements

20. The original information request in this case was made on 16 February 2010. The public authority failed to issue a refusal notice and confirm that it held relevant information until 6 April 2010, outside of the 20 working day limit. Accordingly, the public authority breached sections 17(1) and 10(1).

The Decision

21. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - it correctly withheld the requested information under section 40(2).
22. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - in failing to provide a timely response it breached sections 10(1) and 17(1).

Steps required

23. The Commissioner requires no steps to be taken.

Right of Appeal

24. 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 17th day of January 2011

Signed

**Graham Smith
Deputy Commissioner**

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

Legal annex

Freedom of Information Act 2000

Section 40 - Personal information.

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the 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,

Data Protection Act 1998

SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

- 1 The data subject has given his consent to the processing.
- 2 The processing is necessary—
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
- 3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
- 4 The processing is necessary in order to protect the vital interests of the data subject.
- 5 The processing is necessary—
 - (a) for the administration of justice,
 - (b) for the exercise of any functions conferred on any person by or under any enactment,
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
- 6 (1) 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.

- (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.