

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 July 2011

Public Authority: Isle of Anglesey County Council
Address: Council Offices
Llangefni
LL77 7TW

Summary

The complainant requested, under several numbered questions, information about a Criminal Records Bureau vetting exercise. The Council disclosed some information but refused to confirm or deny whether it held other information. During the course of the Commissioner's investigation the Council withdrew its reliance on the 'neither confirm nor deny' provisions but stated that it considered any relevant information it held to be personal data and exempt under section 40(2) of the Act. The Council also introduced reliance on section 44(1)(a) of the Act. The Commissioner found that the Council had complied fully with parts of the request. The Commissioner found that the Council appropriately applied section 40(2) to information relevant to two of the outstanding questions and section 44(1)(a) to the other.

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. Following an exercise during which Council asked Councillors to voluntarily undergo Criminal Records Bureau (CRB) vetting, the complainant submitted two information requests to the Council. The first was made on 2 July 2010 and asked a number of

questions about the voluntary vetting exercise. The other request was made on 21 July 2010 and was for a copy of an advice note provided to the leader of the Council. The Commissioner has considered each request separately and issued separate decision notices. This notice relates to the first request of 2 July 2010.

The Request

3. On 2 July 2010 the complainant emailed the Council with the following request:

“These are the questions which I need to be answered if at all possible

[1] Are all councillors required to be vetted by the criminal records [sic] bureau if so, within what period after election

[2] were all newly elected councillors required to [be] vetted following the 2008 election

[3] is it council policy to have councillors vetted by the CAB who serve on any committee or in any capacity which deals with issues relating to children or young people

[4] was councillor [named individual] vetted by the CRB

[5] did any councillor [sic] refuse to be vetted

[6] did any councillor fail the vetting procedure

[7] where a councillor either failed to be vetted or refuse [sic] to be vetted, what action can the authority take and what action was taken

[8] where a councillor is also a school governor, is it the responsibility of the school or the authority to get him or her vetted

[9] how are councillors [sic] governors appointed.....by the authority or by invitation of the school”

4. On 12 July 2010 the Council responded by disclosing some information relevant to the request and refusing to confirm or deny whether it held other information. Although it disclosed some information relevant to questions two, four, five, six or

seven of the request, the Council refused to confirm or deny whether it held information that might identify individuals.

5. On 4 October 2010, the complaint asked the Council to review its handling of his request. The Council responded on 18 October 2010 with a letter that referred to its handling of both requests. The Council concluded that its handling of the request of 2 July 2010 had been appropriate.

The Investigation

Scope of the case

6. On 2 November 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant did not specify whether his complaint was about one or both of the requests made to the Council. On 7 December 2010, the complainant confirmed that his complaint related to both requests. In relation to the request of 2 July 2010, to which this notice relates, the complainant clarified that his complaint was specifically about the Council's response to questions two, four, five, six and seven.
7. The Commissioner has considered whether the Council's response to those questions was in accordance with the Act.

Chronology

8. On 6 January 2011, the Council provided the Commissioner with further information regarding its application of exemptions to the requested information. At that stage it clarified that it was relying on section 40(5) of the Act.
9. On 21 January 2011, the Council stated that it was seeking to rely on section 44 of the Act. It stated that it considered section 124(1) of the Police Act 1997 to provide a statutory bar to disclosure of information derived from CRB checks. The Council stated that the statutory duty to protect information derived from CRB disclosures underpinned the Council's reasoning when responding to the request.
10. During the course of the Commissioner's investigation the Council withdrew its reliance on section 40(5) but stated that any relevant information it held in relation to questions four five and six of the request was exempt under section 40(2) of the Act.

11. In light of the change to the Council's position, the Commissioner asked it to provide him with copies of any withheld information. Due to the sensitive nature of the withheld information – ie it all relates to the CRB vetting exercise– the Council was wary of disclosing information it held without a formal instruction from the Commissioner. Consequently, on 16 May 2011, the Commissioner served the Council with an information notice under section 51(1)(a) of the Act requiring it to disclose information – namely information it held relevant to questions four, five and six of the request – that would allow him to make an assessment of the complaint.
12. The Council provided the Commissioner with the relevant information on 24 May 2011. On the same date it wrote to the complainant to inform him that it was no longer relying on section 40(5) of the Act but that it considered the information it held that was relevant to question four, five and six of his request to be exempt under section 40(2).

Analysis

Substantive procedural matters

13. As set out in paragraph 6, above, the Commissioner has only considered the Council's responses to the following questions within the request of 2 July 2010: numbers two, four, five, six and seven.

Question two

14. For the reasons set out below, the Commissioner considers that question two has been fully addressed by the Council.
15. The complainant asked:

“were all newly elected councillors required to [be] vetted following the 2008 election”
16. The Council's response was that there is currently no statutory requirement for Councils to undertake background checks on Councillors. The Council explained the reason behind its decision to ask Councillors to participate in a voluntary vetting exercise. The Council went on to state that it would not confirm or deny whether it held information relating to any Councillors who chose not to participate in the process.

17. The Commissioner considers that the Council has complied with question two. The question required a yes or no answer and the Council has gone further than this by providing some relevant background information.

Question seven

18. For the reasons set out below, the Commissioner considers that question seven has also been fully addressed by the Council.

19. The complainant asked:

“where a councillor either failed to be vetted or refuse [sic] to be vetted, what action can the authority take and what action was taken”

20. The Council stated that there is no statutory requirement for Councillors to undergo CRB checks and therefore no sanction available to it. The Council stated that if it had discovered information about a Councillor through CRB checks it would take appropriate measures to safeguard the interests of the public and the Council. The Council initially refused to confirm or deny whether it held information about any Councillors who may or may not have chosen to participate in the vetting process.
21. The Commissioner considers that by clarifying that there were no sanctions available, the Council has responded to the request.
22. The Commissioner notes that the request did not ask what sanctions were available and had been taken in light of the results of the CRB vetting exercise. The question clearly asked about action that could be and was taken should a Councillor fail to or refused to be vetted. The Council has clarified that there is no statutory requirement to undertake background checks on Councillors and no sanction available to the authority; ergo it could not take any action.

Exemptions

Section 44 – prohibitions on disclosure

23. Section 44(1) states that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment,

*(b) is incompatible with any Community obligation, or
(c) would constitute or be punishable as a contempt of court."*

24. If engaged, this exemption is absolute and there is no need to consider the public interest in disclosure against the public interest in withholding the information.
25. The public authority has not cited the subsection of this exemption upon which it is seeking to rely. However, based on the wording of its responses, the Commissioner has assumed that this is subsection (1)(a).
26. In this case the public authority has stated that section 124(1) of the Police Act 1997 (the 'Police Act') provides a statutory prohibition – or 'bar' – to disclosure.
27. Section 124(1) of the Police Act states that:

"(1)A member, officer or employee of a body registered under section 120 commits an offence if he discloses information provided following an application under section 113 or 115 unless he discloses it, in the course of his duties,—

(a) to another member, officer or employee of the registered body,

(b) to a member, officer or employee of a body at the request of which the registered body countersigned the application, or

(c) to an individual at whose request the registered body countersigned the relevant application."

28. The Commissioner does not consider that information relevant to questions four and five of the request can be categorised as information provided under an application under section 113 or 115 (criminal records checks and enhanced criminal record checks) of the 1997 Act.
29. Question four asked whether a named Councillor was vetted and question five asked whether any Councillors refused to be vetted. The Commissioner considers that it was reasonable for the Council to interpret question five broadly; ie that the complainant was interested in the names of any Councillors who were not vetted (whether they refused or whether there was another reasons they did not participate). However, he does not consider that information relevant to those two

questions to constitute information provided "following an application" for a CRB check.

30. The Commissioner does consider section 124(1) of the Police Act to apply to question six of the request. The questions asked, "did any councillor fail the vetting procedure". Although the Council disputes the premise that an individual can fail a CRB check – and the Commissioner agrees with the Council's position – based on its correspondence with the complainant, it interpreted the request to be for details of any criminal convictions returned following the vetting exercise and the name of any relevant Councillor.
31. The Commissioner considers that such information falls under section 124(1) of the Police Act and that section 44(1)(a) of the Act is therefore engaged. The exemption is an absolute exemption and there is therefore no need to consider the public interest test.

Section 40 - personal information

32. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles.

Is the requested information personal data?

33. Personal data is defined at section 1(1) of the Data Protection Act 1998 (the "DPA") as:

"personal data means data which relate to a living individual who can be identified-

(a) from those data,

(b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

34. When considering whether the information is personal data, the Commissioner had regard to his own published guidance, '*Determining what is personal data*'.¹
35. Taking into account his guidance on this matter, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of 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?"*
36. The requested information in this case relates to a CRB vetting exercise carried out by the Council and the Commissioner is satisfied that information relevant to both questions four and five of the request identifies living individuals and that the information is their personal data. Having already determined that information relevant to question six of the request is exempt under section 44 of the Act, the Commissioner has not considered whether it is exempt under section 40(2).

Is the requested information sensitive personal data?

37. In its refusal notice of 12 July 2010, the Council stated that if it held information relevant to questions four, five and six of the request (at that stage it was still relying on the neither confirm nor deny provisions of section 40(5)) it would be sensitive personal data, as defined by section 2 of the DPA.
38. Although the Council did not specify the subsection that it considered relevant, the Commissioner's view is that, as the request relates to a CRB vetting exercise, section 2(g) of the DPA is most relevant in this case. Section 2(g) defines sensitive personal data as:
- "...personal data consisting of information as to –
- ...(g) the commission or alleged commission by him [the data subject] of any offence..."

¹http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

39. The Commissioner is not satisfied that information held by the Council in relation to question four of the request is sensitive personal data. The question asked whether a named Councillor was "vetted". The Commissioner considers that a positive or negative response to this question would not disclose information regarding the commission or alleged commission of any offence by that Councillor.
40. The Commissioner is not satisfied that any information relevant to question five is sensitive personal data. The Commissioner concluded that the Council was correct to interpret the request to be for the names of any Councillors that were not, or refused, to be vetted but the names of any such Councillors on their own do not represent sensitive personal data; ie disclosure of the names of any Councillors who did not participate would not constitute disclosure of the commission or alleged commission of any offence by those individuals.
41. Having established that the information in question was personal data but not sensitive personal data, the Commissioner went on to consider whether disclosure of the withheld information would breach any of the data protection principles.

Would disclosure contravene any of the data protection principles?

42. In correspondence with the Commissioner, the Council stated that it considered disclosure of information relevant to questions four and five of the request would breach the first and second data protection principle.
43. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - at least one of the conditions in schedule 2 of the DPA is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 of the DPA is met.
44. The second data protection principle requires that personal data shall be obtained for one or more specified and lawful purposes and not processed in any manner incompatible with those purposes.
45. The Commissioner has considered information relevant to questions four and five in turn to determine whether disclosure would breach any of the data protection principles.

Question five

46. Question five asked whether any Councillors refused to participate in the vetting exercise. In its refusal notice of 12 July 2010, the Council refused to comment on individual cases but stated that "it did not hold CRB checks against 3 Councillors".
47. The Commissioner considers that, given the context of its correspondence with the complainant, it was reasonable for it to interpret the request broadly – ie to be for the names of any Councillors who did not participate in the vetting exercise. The Council has clarified that it holds this information and the Commissioner has therefore considered first of all whether disclosure would breach the first data protection principle.
48. The Commissioner's approach to assessing whether disclosure would breach the first data protection principle is to firstly consider whether disclosure would be fair. In considering the issue the Commissioner has taken the following factors into account:
- The reasonable expectations of the data subjects.
 - Consequences of disclosure.
 - The legitimate interests of the public.

The reasonable expectations of the data subjects

49. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example privacy. It is accepted that every individual has the right to some degree of privacy and this right is enshrined in Article 8 of the European Convention on Human Rights.
50. Taking into account the fact that the vetting exercise was voluntary and that there was no statutory power for the Council to oblige Councillors to participate nor any sanction available if they chose not to, it could be argued that participants would have had a general expectation that information regarding the exercise – including whether or not they participated – would not be placed into the public domain.
51. However, the fact that this information relates to the public, as opposed to private life, of the Councillors in question has

significance. The Commissioner's awareness guidance on section 40² suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

52. The Commissioner therefore considers that individuals who represent the electorate, such as MPs and Councillors, should have a greater expectation that information relevant to those roles might be disclosed.

Consequences of disclosure

53. The Commissioner considers that there would be likely to be negative consequences for the Councillors concerned if the Council were to confirm that they did not participate in the vetting exercise. For example, it is likely that - particularly given the history of problems of corporate governance within the Council and conflict between Councillors that have been well publicised over recent years - there would be significant media interest in this matter. The Councillors in question would be likely to face significant questioning regarding the reasons they did not participate in the exercise. It is also likely that the media and electorate would interpret their lack of participation as an attempt to hide convictions.
54. The negative publicity that the Councillors would be likely to face would undoubtedly cause them and their families significant distress.

The legitimate interests of the public

55. Notwithstanding the data subjects' reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx

argued that there is a more compelling public interest in disclosure. For example, in the case involving the MP's expenses the former Information Tribunal commented that:

'79. ...in relation to the general principle application of fairness under the first data protection principle, we find:

(..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'.

56. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter. In this case it is not possible to take a proportionate approach.
57. The Commissioner considers that there is a legitimate public interest in knowing whether particular Councillors participated in a CRB vetting exercise but he has to balance the interests of the data subjects with the legitimate public interest in disclosure. The Commissioner considers that the right to privacy of the data subjects who did not participate would be significantly compromised if the Council were to disclose their names.
58. On balance, taking into consideration the likely significant negative consequences of disclosure and the fact the vetting exercise was voluntary the Commissioner considers that disclosure of information relevant to question five would be unfair. As such he considers that disclosure would breach the first data protection principle. The Commissioner has not therefore gone on to consider whether disclosure would breach the second data protection principle.

Question four

59. Question four of the request asked whether a named Councillor was "vetted".
60. In paragraphs 48-58 above, the Commissioner considered whether, under the first data protection principle, disclosure would be fair. In doing so, he considered the following factors:
 - The reasonable expectations of the data subjects.

- Consequences of disclosure.
- The legitimate interests of the public.

61. The Commissioner has considered the same factors when considering question four of the request but, for the sake of brevity, has not repeated the arguments in full.

The reasonable expectations of the data subjects

62. The Commissioner considers that the arguments regarding the reasonable expectations, previously set out in paragraphs 49-52, above, are directly transferrable. He has not therefore repeated them.

Consequences of disclosure

63. The Commissioner considers that the consequences of disclosure are dependent on whether the named Councillor participated in the vetting exercise. If he or she did not participate then the negative consequences set out previously in this notice are directly relevant (see paragraph 53). If he or she did participate then it could be argued that disclosure might have a positive outcome for the named Councillor; the electorate might view the fact that a particular Councillor participated in the vetting exercise – even if they do not know the outcome – in a favourable light.

64. However there is an argument linked to the latter scenario that the Commissioner considers relevant; by obtaining clarification of whether a specified Councillor participated the complainant could ultimately – by repeating the request for each elected Councillor – obtain the names of those Councillors who did not participate. The Commissioner considers therefore that the consequences of disclosure could therefore be significant – not necessarily for the Councillor named in the request but for Councillors who did not participate in the voluntary exercise.

The legitimate public interest

65. The Commissioner considers that the arguments regarding legitimate interests previously referred to in this notice are relevant.

66. On balance, taking into account that disclosure has the potential to ultimately reveal the identity of the Councillors that did not participate in the vetting exercise, the Commissioner

considers that disclosure would be unfair and would therefore breach the first data protection principle. As such he has not gone on to consider whether disclosure would breach the second, or any other, data protection principle.

Procedural Requirements

67. Section 17(1) provides that where a public authority is relying on an exemption to refuse a request for information, it should issue a notice stating that fact and specifying the exemption in question. In its refusal notice of 12 July 2010 the Council did not clarify that it was relying on sections 40(5)(b)(i), 40(2) and 44(1)(a). Neither did the findings of the internal review provide clarity on this issue. As such, it breached section 17(1)(b).

The Decision

68. 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 provided a full response to questions two and seven of the request.
- It correctly applied section 44(1)(a) to information relevant to question six of the request.
- It correctly applied section 40(2) to information relevant to questions four and five of the request.

69. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The Council breached section 17(1)(b) by failing to specify in its response to the request, to the relevant subsection, the exemption it was relying on.

Steps Required

70. The Commissioner requires no steps to be taken.

Right of Appeal

71. 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

72. 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.

73. 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 7th day of July 2011

Signed

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

Legal Annex

Freedom of Information Act 2000

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."

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."

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).”

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 the 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)."

Prohibitions on disclosure

Section 44(1) provides that –

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court."

The Data Protection Act 1998

The first data protection principle provides 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."