

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 July 2011

Public Authority: Borough of Poole
Address: Civic Centre
Poole
Dorset
BH15 2RU

Summary

The complainant requested information in respect of the employment history of two named social workers. The Council refused to provide this information citing section 40(2) of the Act. The Commissioner has investigated and finds that the Council correctly applied section 40(2) of the Act. The Commissioner has also recorded a breach of section 17(1)(c) of the Act in respect of the Council's handling of this request for information.

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 14 April 2010 the complainant requested the following information from the Council:

My second question is: you cannot establish whether [named individual A] or [named individual B] nee [previous name] worked together in [named Social Services], can you please confirm or deny that [named individual B] nee [previous name] when transferred to Poole was transferred from [named Social Services] or when first employed by Poole had previously been employed by [named Social Services]? This transfer or new start of employment for [named individual B] would

have been late 2000 or early 2001. You will have this information in [named individual B's] employment history.

...I had a seventh question and forgot to write it, with regard to the freedom of information request, question three was not answered, ie On the 17 November 2008, what was [named individual B's] rostered duty?"

3. The Council refused to provide information in respect of questions two and seven citing the Data Protection Act but not specifying an exemption.
4. On 19 April 2010 the complainant expressed dissatisfaction with the Council's response to points 2 and 7 of her request and on the same date the Council communicated the outcome of its internal review to the complainant confirming that it held the requested information about its employee [named individual B] and citing section 40(2) of the Act.
5. Following a complaint to the Commissioner, a subsequent internal review dated 17 November 2010 reiterated that the information was about an individual's employment history which constitutes personal information. It concluded that disclosure of such information would contravene data protection principles under section 40(2) which would be unfair and unlawful.

The Investigation

Scope of the case

6. On 9 August 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The Council's procedural handling of her request for information.
 - The Council's refusal to provide some information.
7. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this notice:
 - Question one of the complainant's request was in relation to an internal administrative matter and is not therefore part of this investigation.
 - The complainant was satisfied with the responses she received to questions three, four, five and six.

8. The scope of this investigation therefore relates to the Council's procedural handling of this request for information and to its response to questions two and seven of the complainant's request for information dated 14 April 2010.
9. The complainant also raised other issues that are not addressed in this notice because they are not requirements of Part I of the Act..

Chronology

10. Having clarified the scope of the complaint with the complainant, the Commissioner contacted the Council on 28 February 2011 requesting details of the withheld information not provided to date and further arguments in support of the section 40(2) exemption.
11. The Council responded on 11 March 2011 and in respect of question 7 stated that they have no formal record of the information as the material is not maintained in any HR system. The Council confirmed that in line with its records and retention policy, it is only required to keep this information for a period of two years. The Council further commented that the only way it obtained this information was to ask the individual employee directly and explained that the individual has not consented to its disclosure.
12. The Council concluded that with hindsight it believed a more appropriate response to the complainant would have been that 'the information is not held' rather than to have applied an exemption.
13. On 18 April 2011 the Commissioner contacted the Council in response to the 'information not held' issue raised by the Council. The Commissioner pointed out that the date in question was 17 November 2008 and that both of the complainant's requests (13 November 2009 and 14 April 2010 respectively) were within the two year period that the Council was required to hold the information based on its own records and retention policy.
14. The Commissioner therefore informed the Council that he was not persuaded by the Council's reliance on 'information not held'. He did however request that should this information have been destroyed before the date of these requests, that the Council provide details of why this was done in contravention of its records and retention policy. The Commissioner also asked for further arguments in respect of the section 40(2) exemption and the Council responded on 5 May 2011.
15. On 4 July 2011 the Council confirmed that it was withdrawing its reliance on the 'information not held' provision within the Act and wished to revert to section 40(2) of the Act.

Analysis

Exemptions

Section 40(2) – Personal information

16. 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.
17. In its letter to the complainant dated 17 November 2010, the Council informed the complainant that it considered the information to be the personal information of a third party. It added that it was exempt from disclosing information relating to a third party where disclosure would contravene any of the data protection principles.
18. The complainant has disputed that she is seeking personal information of named individual B as she has stated that she is not asking for details of her working day on the day in question. She has also argued that details of her previous employment history is an employment fact, as opposed to personal data. The complainant has further argued to the Commissioner that when summoned to a court the individual would have to answer the question.
19. However, the Commissioner would point out that the scope of his investigation is whether information should be disclosed under the Act as such disclosure is effectively into the public domain.
20. In order to reach a view regarding the application of this exemption, the Commissioner firstly considered whether or not the requested information was in fact personal data. Both requests numbered 2 and 7 will be considered together in this analysis.

Is the requested information personal data?

21. Personal data is defined at section 1(1) of 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.”*

22. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "*Determining what is personal data*".¹
23. 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?*"
24. Whilst the Commissioner acknowledges that the date by itself or confirmation or denial of whether the individual in question worked for [named] Social Services, does not necessarily constitute personal information, when linked to the name of the individual concerned, both the date and whether or not the individual ever worked for [named] social services department becomes biographically significant as it reveals whether or not the individual was in work on that day and whether or not she has ever worked for [named] social services. The Commissioner considers that the requested information does fulfil the above criteria and therefore constitutes personal data.
25. The Commissioner has gone on to consider whether disclosure of the information would contravene any of the data protection principles.
26. The Council did not provide details of the specific data protection principle that would be breached through disclosure but the Commissioner considers the first principle to be the most relevant in this case.

Would disclosure contravene the first data protection principle?

27. 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 is met, and

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

- in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

28. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

29. In considering whether disclosure of the withheld information would be fair, 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

30. The Commissioner's awareness guidance on section 40 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.² 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."

31. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).

32. The Commissioner notes that the requested information relates to the data subject's professional life. However, the Commissioner is mindful that not all information relating to an individual's professional or public

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

role is automatically suitable for disclosure. He notes that whilst there may be little expectation of privacy with regard to information relating to a data subject's work duties, there may still be an expectation that personnel (HR) details will not be disclosed.

33. As part of his assessment of fairness, the Commissioner has also taken into consideration whether the data subject has consented to the disclosure of the information and notes that the data subject has refused to give consent in this case.
34. When considering the issue of consent, the Commissioner's view is that any refusal to consent is not absolutely determinative in the decision as to whether the data subject's personal data will be disclosed. However, where the data subject consents to the disclosure of their personal data within the time for statutory compliance with the request, then this disclosure will generally be considered fair.
35. Notwithstanding the fact that the information relates to the professional role of the named social worker, based on the nature of the withheld information and the data subject's refusal to consent to disclosure, the Commissioner is satisfied that the individual would have had a reasonable expectation that the requested information would be kept confidential and not passed to third parties without the data subject's consent.

Consequences of disclosure

36. In his assessment of the consequences of disclosure, the Commissioner is also mindful of the fact that it is not always possible to quantify or prove the impact that disclosure may have on the data subject. In this particular case, the Commissioner considers that disclosure is likely to cause unwarranted and unnecessary distress to the data subject at the centre of the request and, bearing in mind her refusal to allow consent, the possibility of distress is very likely.

The legitimate public interest in disclosure

37. 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 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'.

38. 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.
39. In this particular case, the Commissioner accepts that in addition to the broad general principles of accountability and transparency there is a legitimate interest in establishing whether the potential conflict of interest did arise. However, the Commissioner is not persuaded that this is necessary for the matter to be investigated as the Council has its own corporate complaints process open to the complainant to pursue and if, after exhausting this process she remains dissatisfied, she could complain to an external investigative body such as the Local Government Ombudsman and/or the General Social Care Council.
40. Therefore, in balancing the reasonable expectations of the data subject and the consequences of disclosure of the information against the legitimate public interest in disclosure, whilst the Commissioner accepts that there is a legitimate interest in disclosure he considers it to be outweighed by the reasonable expectations of the data subject and the potential consequences of disclosure. The Commissioner has therefore determined that it would not be fair to disclose the requested information. In his view, disclosure would breach the first data protection principle. He therefore upholds the Council's application of the exemption at section 40(2).

Procedural Requirements

Section 17(1) – Refusal of request

41. Section 17(1) of the Act states:

"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."

The Commissioner notes that whilst the Council informed the complainant that it was relying on section 40(2) of the Act, it did not satisfactorily explain why the exemption applies. This represents a breach of section 17(1)(c) of the Act.

The Decision

42. 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:

- The Council correctly withheld the information under section 40(2) of the Act.

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

- The Council's failure to state satisfactorily why the exemption applies represents a breach of section 17(1)(c) of the Act.

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- The Commissioner requires no steps to be taken.

Right of Appeal

45. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

46. 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.
47. 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 11th day of July 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(d) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(e) if that is the case, to have that information communicated to him."

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 -

(f) states that fact,

(g) specifies the exemption in question, and

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

Personal information.

Section 40(1) provides that –

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

Section 40(2) provides that –

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

(i) it constitutes personal data which do not fall within subsection (1), and

(j) either the first or the second condition below is satisfied."