

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 August 2011

Public Authority: The Governing Body of Bishop Burton College
(‘the College’)

Address: Bishop Burton
Beverley
HU17 8QG

Summary

The complainant requested the exact post or job titles of the 17 individuals that the College made redundant. The College provided a summary of the posts, but explained that it considered that the exact information was exempt and maintained its position in its internal review. The complainant referred the case to the Commissioner. During the course of the Commissioner’s investigation, the College agreed to disclose the full job titles for six of the individuals. For the remainder, it confirmed that it believed that sections 40(2) and 41(1) applied to the post titles. The Commissioner considers that section 40(2) has been applied appropriately to the outstanding withheld information. He has, however, noted a number of procedural breaches. He requires no remedial steps to be taken in this case.

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 11 February 2011 the complainant made a request for information for the following four items:

"1). Please provide the number of redundancies carried out due to restructure by the college.

2). Please provide a list of those job titles/ posts which have been made redundant due to restructure.

3). Please provide a list of job titles/ posts which have been created within areas of the college which have been previously been subject to redundancy due to restructure.

4). Please indicate the total cost to the college of statutory redundancy payouts."

3. On 15 February 2011 the College issued its response. It answered questions 1, 3 and 4. For question 2, it said it was unable to provide the information because it believed it would be either a breach of the Data Protection Act or a breach of a contractual responsibility of confidentiality. It explained that it may be possible to resolve this issue if the complainant could suggest a different format for the information, and asked whether the complainant had such a suggestion.
4. On 14 March 2011 the complainant requested an internal review into its response about question 2. He explained why he believed that the information could not be withheld by virtue of section 40(2).
5. On 18 March 2011 the College communicated the results of its internal review, and repeated its previous arguments. Again, it did not specify which exemption(s) it was relying on.

The Investigation

Scope of the case

6. On 24 March 2011 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 points:
 - he did not think the withheld information could be used to identify a living individual and therefore argued it was not personal data; and
 - other Colleges have provided information of the same description.
7. During the course of the case the complainant agreed with the Commissioner that his investigation would determine the following:

- whether the information that falls under request 2 (the list of full job titles/posts) was exempt under sections 40(2) or 41(1)¹; and
 - any procedural issues about the handling of the request.
8. During the course of the Commissioner's investigation the College disclosed some of the previously withheld information. Therefore, the Commissioner has only considered the application of sections 40(2) and 41(1) to the remaining outstanding information in this case.

Chronology

9. On 1 April 2011 the Commissioner wrote to the College and the complainant to confirm that he had received an eligible complaint. He asked the College for a copy of the withheld information.
10. On 14 April 2011 the College responded. It explained its understanding of the situation and asked the Commissioner for further clarification.
11. On 6 July 2011 the Commissioner confirmed that he required the withheld information and asked a number of questions about it.
12. On the same day, the Commissioner wrote to the complainant to establish the scope of his investigation. On 8 July 2011 he received a response.
13. On 18 July 2011 the Commissioner received a copy of the withheld information and detailed opening arguments from the College. It also explained that it was now prepared to disclose some of the previously withheld information.
14. On the same day, the Commissioner wrote to the complainant to set out his detailed preliminary view about this case. He asked the complainant whether he wanted this case to continue (after he had received the previously withheld information that the College was now prepared to disclose). The complainant confirmed that he wanted a Decision Notice for this case.
15. On 20 July 2011 the Commissioner asked the College to provide the six roles to the complainant directly. This was done on 21 July 2011.

Analysis

¹ All of the sections of a statute that are cited in this Notice can be found in full in the Legal Annex attached to it.

Exemptions

16. The College was not clear about what exemptions it was applying prior to the Commissioner's investigation. However, it confirmed for the Commissioner that it wished to apply both sections 40(2) and 41(1) to all of the outstanding withheld information.
17. The Commissioner has first considered the application of section 40(2).

Section 40(2)

18. Section 40(2) provides an exemption for information that which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) and 40(4) apply.
19. In this case, the relevant condition to consider is contained in section 40(3)(a)(i), which applies where the disclosure of information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the "DPA"). This is an absolute exemption, and is therefore not subject to a public interest test.
20. In order to establish whether this exemption has been correctly applied, the Commissioner has considered:
 - whether the information in question was personal data; and
 - whether disclosure of the personal data under the Act would contravene the first data protection principle.

Is the information personal data?

21. Personal data is defined in the DPA as information which relates to a living individual who can be identified:
 - from that information, or
 - from that information and other information which is in the possession of, or is likely to come into the possession of, the data controller.
22. The complainant contended that the names of the posts could not be said to be personal data. He explained that he did not believe that it was possible for the job titles to enable identification of a single individual. He said that even if there were only one person in that role, they would not be identifiable by their post alone.
23. In its detailed submissions, the College partially agreed with the complainant. It explained that where the nature of the posts meant there were a number of staff with the same post title and/or where was

a large turnover of staff, then this might mean that it would not be possible to identify individuals. It agreed, on that basis, to disclose some of the previously withheld information.

24. However, the remaining information was different. The post titles had only been held by a small number of individuals in the five-year period and for those it was clear that the disclosure of the post would lead to members of the public being able to identify which living individuals were made redundant. In its view, this information was biographical to the individuals concerned and constituted their personal data.
25. The issue about when information is to be regarded as anonymous was considered recently by the High Court in the lead case *R on behalf of the Department of Health v the Information Commissioner's Office* [2011] EWHC 1430 (Admin). Mr Justice Cranston explained that he was bound by precedent to follow Lord Hope's speech in the House of Lords' decision *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 and explained what that approach entailed. In summary.
 - a) Data would not be personal data if the other information was incapable of adding anything, and the data itself could not lead to identification, or if the data had been put into a form from which individuals to whom they related could not be identified at all, even with the assistance of the "other information" from which they were derived (at paragraph 24).
 - b) In the latter situation, a person who had access to anonymised data and "other information" held by the data controller would find nothing in the anonymised data that would enable identification. It would be the "other information" only, and not anything in the anonymised data, which would result in the identification (ibid).
 - c) The question is whether the data controller, or anybody else who was in possession of the anonymised data, would be able to identify the living individual or individuals to whom the data in that form related. If it were impossible for the recipient of the anonymised data to identify those individuals, the information would not constitute 'personal data' in his hands (at paragraph 26).
 - d) The fact that the data controller has access to the non-anonymised information does not disable it from processing it an anonymised way, consistently with recital 26 of the Directive, so that it becomes data from which a living individual can no longer be identified. If anonymisation can achieve this, the way will then be open for the information to be released in that form because it will no longer be personal data (at paragraph 27).

e) Whether it can do this is a question of fact for the Commissioner on which he must make a finding. If he is unable to say that in that form it would be fully anonymised, then he will need to consider whether disclosure of this information by the agency would be in accordance with the data protection principles and in particular whether it would meet any of the conditions in Schedule 2 (ibid).

26. The Commissioner has considered the withheld information, the number of staff who held those positions, information already in the public domain and both sides' arguments. Having done so he considers that the outstanding withheld information is the personal data of the College employees concerned. In reaching this view he has taken into account the following points.

- He notes that the outstanding information relates to a small number of staff who held those posts, and considers that this makes them more likely to be identified.
- He considers that it would be possible to use the outstanding withheld information, together with publicly available sources, to identify who was made redundant (using the internet and/or College minutes).
- Disclosure under the Act amounts to disclosure to the public at large. The public at large also includes a number of people who know specific information about the school – such as parents, helpers etc and they would be able to identify the individuals with no difficulty at all from their previous job title.
- He does not consider that the relatively large time period covered by the request mitigates the possibility of identification to any extent.

Would disclosure contravene the first data protection principle?

27. The Commissioner has gone on to consider whether disclosure of the outstanding withheld information would breach the first data protection principle. The first principle requires, amongst other things, that the processing of personal data is fair.

28. Therefore, the Commissioner has first considered whether the disclosure of the outstanding withheld information would be fair.

Would disclosure be fair to the data subjects?

29. The complainant contends that it is appropriate and fair for the information to be disclosed to the public. He offered the following arguments:

- the individual member of staff was employed on public money and thus transparency is expected;
- there is no real expectation that the employee has a positive relationship with their ex-employer;
- there should not be a difference between the information disclosed about posts held (and those about posts that are abolished); and
- the post title and the timeframe of the request mitigates the possibility that it would be unfair to a specific individual.

30. The College has argued that disclosure would be unfair because of the following.

- A number of individuals had entered a compromise agreement with the College. These agreements imposed a reciprocal obligation on the College and the individual to maintain confidentiality about the circumstances that led to them leaving. It would not be fair for the College to break the agreement.
- It might be the case that the individuals feel (however inappropriately) embarrassed or ashamed that they were made redundant and not want that to be made public.
- The disclosure of the information to the public may lead to the individuals being contacted directly leading to distress for these individuals.
- There are no real legitimate interests in knowing the post titles beyond the summary that was provided and the money that it cost.
- The information was not in the public domain (as far as it knew).

31. When considering fairness in this case, the Commissioner considered:

- the ease with which the disclosed information could be tied to identifiable living individuals;
- the reasonable expectations of the data subjects when they are in a redundancy situation;

- the possibility of those individuals suffering distress;
 - the presence or otherwise of compromise agreements;
 - the individuals' seniority (or otherwise) and the fact that they were employed with public money; and
 - the legitimate interests of the public in knowing this information.
32. While the information, in the form requested by the complainant, does not contain names, the College argues that it relates to a small number of individuals who worked together and were known to its community for their role. It is therefore reasonable and realistic to assume that there would be colleagues or acquaintances of the individuals who would be able to identify which individuals were made redundant by the post titles they held. It is therefore likely that there will be individuals who would be able to associate the outstanding information, if disclosed, with specific persons. The Commissioner does not therefore consider that the difficulty in tracking these people down would make disclosure more likely to be fair in this case.
33. The Commissioner considers that a redundancy situation generates its own set of expectations. Individuals can lose their job through no fault of their own and it is a process whereby people can feel that their commitment and input into an organisation was not appreciated and they may be forced to leave. In his view the expectations of a data subject are that information about their redundancy would remain private between the ex-employer and the ex-employee. Bearing in mind the circumstances of the case, the Commissioner considers that it would not be within the reasonable expectations of the individuals concerned for the outstanding information to be put into the public domain.
34. The Commissioner accepts that the potential reopening of these matters could cause the individuals concerned distress or damage. This may be caused directly by the disclosure reopening issues of embarrassment for the data subject or indirectly through a loss of faith in the College keeping personal data securely.
35. A number of the individuals concerned signed a compromise agreement. Those individuals' expectations are reinforced as both sides have reciprocal obligations to keep confidential the situation when the employment relationship came to an end.
36. On the other hand, the Commissioner considers that the employment of individuals in public roles does create some expectation of transparency. In addition, as individuals become more senior they have more responsibility and their decisions have greater importance and thus there is a greater need for accountability. However, particularly in this

case where general roles and the money that was spent have been disclosed, he does not consider that these arguments have adequate weight to outweigh the reasonable expectation that this information would remain private.

37. While transparency and accountability are the cornerstones of the Act, the Commissioner does not consider that there is sufficient legitimate public interest in knowing the full post titles to render their disclosure to the public fair to the individuals concerned.
38. Because disclosure of the outstanding withheld information would enable private information to be deduced about the individuals concerned; because wider knowledge of that information would be likely to have undesirable consequences for those individuals; and because those individuals have a reasonable expectation that the information will remain private, the Commissioner concludes that the disclosure of the outstanding withheld information would be unfair.
39. Therefore, the Commissioner upholds the College's use of section 40(2) to withhold the outstanding information.
40. As section 40(2) has been applied appropriately, the Commissioner does not need to go on to consider the operation of section 41(1).

Procedural Requirements

41. The Act requires that a complete refusal notice is issued within 20 working days. Although the College issued a refusal notice within this time period, it failed to cite or explain the relevant exemptions, and therefore breached section 17(1)(b) and (c).

The Decision

42. The Commissioner's decision is that the College dealt with the following elements of the request in accordance with the requirements of the Act:
 - it correctly withheld the outstanding information under sections 40(2) and 40(3)(a)(i).
43. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - the College failed to state or explain the exemptions that it was relying on by the time of its internal review and so breached section 17(1)(b) and (c).

Steps Required

44. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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 25th day of August 2011

Signed

**Jon Manners
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 –

(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(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-

- (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-

- (c) 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-
 - 1. any of the data protection principles, or
 - 2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (d) 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-

- (e) 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
- (f) does not arise in relation to other information if or to the extent that either-
 - 3. 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

4. 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)."

Section 40(6) provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

Section 40(7) provides that –

"In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act."

Information provided in confidence

Section 41(1) provides that –

"Information is exempt information if-

(g) it was obtained by the public authority from any other person (including another public authority), and

(h) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Section 41(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."