

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 January 2012

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
Shropshire
SY2 6ND

Summary

The complainant requested details of Council staff who attended a particular property, when access was gained by the Police. The Council provided some information relevant to the request but refused to disclose the names of the individuals by virtue of section 40(2). The Commissioner has investigated and determined that the Council correctly applied section 40(2) to most of the remaining withheld information. Section 40(2) was incorrectly applied to one name, which the Council must disclose. The Commissioner has identified a number of procedural shortcomings in the way the Council handled the complainant's 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. Prior to the request which is the subject of this notice, the complainant made a number of requests to the Council relating to the entry to the particular property and the background leading up to the entry to the property.

3. In an email to the Council dated 22 September 2010, (which was an internal review request in relation to an earlier request for information), the complainant made a new request for details of Council staff who attended the property at the time of entry by West Mercia Police, and specifically the names and positions of the members of staff. This request was repeated in part in a subsequent email from the complainant to the Council dated 26 November 2010 in which he asked whether anyone from the Council had attended the property on the day in question and if so, the names of those officers.
4. The Council failed to identify these communications as new requests and did not respond. During the Commissioner's investigation into a previous complaint from the complainant, he contacted the Council and asked it to respond to the requests of 22 September and 26 November 2010 under the provisions of the Act.
5. On 6 January 2011 the Council responded to the requests and confirmed that two members of staff from its Housing Services team attended the property in question on 3 June 2010. The Council refused to disclose the names of the individuals under section 40(2) of the Act.
6. On 10 January 2011 the complainant contacted the Council and requested a review of its decision not to release the names of the two members of staff. In this communication, he made a new request for "the identity of the next in the chain of command, or the head of the Department, whichever comes first".
7. The Council responded to the internal review request on 21 January 2011. It upheld its decision that the names of the officers who attended the property were exempt by virtue of section 40(2) of the Act. The Council confirmed that the two officers worked within its Housing Services section and that they reported to the Head of Landlord Services. The Council also withheld the name of the Head of Landlord Services under section 40(2) of the Act.

The Investigation

Scope of the case

8. On 21 January 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 whether the information requested should be disclosed.
9. The scope of the Commissioner's investigation has been to consider whether the Council was correct to withhold the names of the two

Council officers who attended the property in question during the entry by West Mercia Police on 3 June 2010, and the name of their Reporting Officer, under section 40(2) of the Act. Throughout the remainder of this Notice, the officers who attended the property will be referred to as Officer A and Officer B and their Reporting Officer as Officer C.

Chronology

10. The Commissioner wrote to the Council on 30 March 2011 asking for copies of the withheld information and further representations in relation to its application of section 40(2) of the Act.
11. The Council responded to the Commissioner's letter and provided the withheld information on 26 April 2011.
12. On 17 May 2011, the Commissioner wrote to the complainant to try to agree an informal resolution of his complaint. The Commissioner set out his preliminary view that section 40(2) was engaged and the Council was therefore correct to withhold the requested information.
13. The complainant advised the Commissioner on 18 May 2011 that he did not wish to withdraw his complaint. The complainant requested that the Commissioner either carry out further enquiries to secure release of the information requested or proceed to a formal decision in the case.

Analysis

Exemptions

14. Section 40(2) of the Act provides an exemption for information that is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied. In this particular case the condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles as set out in Schedule 1 to the Data Protection Act 1998 ('the DPA'). All relevant sections of the legislation are reproduced in the attached legal annex.
15. The Council considers that the information requested constitutes the personal data of the individual officers, that disclosure would be unfair and would therefore breach the first data protection principle. The Commissioner agrees that the relevant principle here is the first principle; the requirement that any processing should be fair and lawful.

Is the information personal data?

16. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
17. In considering whether the information requested is “personal data”, the Commissioner has taken into account his own guidance on the issue¹. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable. Information will “relate to” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way.
18. The Commissioner accepts that a living individual can be identified from their name and is satisfied that the names which have been withheld clearly constitute personal data.

Would disclosure contravene any of the principles of the DPA?

19. As the Commissioner is satisfied that the information requested constitutes the personal data of the individual Council officers, he has gone on to consider whether disclosure would breach any of the data protection principles. As stated in paragraph 15 above, the Council claimed that disclosure of the withheld information in this case would breach the first data protection principle.

The first data protection principle

20. The first data protection principle has two main components. They are:
- the requirement to process all personal data fairly and lawfully; and
 - the requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.
21. Both requirements 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 protection principle. The Commissioner’s general approach to cases involving

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

personal data is to consider the fairness element first. Only if he believes that disclosure would be fair would he move on to consider the other elements of the first data protection principle.

Would disclosure of the information be fair?

22. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individuals. He has then balanced these against the general principles of accountability, transparency and legitimate public interest.

a) Expectations of the individuals concerned

23. 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 so important that it is enshrined in Article 8 of the European Convention on Human Rights.
24. 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. The Commissioner's guidance makes it clear that where the information relates to the individual's private life (ie 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).
25. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse.
26. The Commissioner notes that the withheld information relates to the individuals in a professional capacity and there are no 'private' considerations. In relation to Officer A and Officer B, their attendance at the property was undertaken as part of their role as public sector employees. Their line manager Officer C, had no involvement in the entry to the property and their name has been requested in relation to the two officers who attended the property.

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

27. The Commissioner's guidance also states that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the Act. This is because the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions relating to the expenditure of public funds. In previous decision notices the Commissioner has stated that he considers that occupants of senior public posts are more likely to be exposed to greater levels of scrutiny and accountability and there should therefore be a greater expectation that some personal data may need to be disclosed in order to meet that need.
28. Officer A and Officer B are junior members of staff who have limited public facing roles in relation to dealing with specific issues and cases involving members of the public, for example undertaking house visits. Officer C is a more senior member of staff, the Council argues they do not have a public facing role, but is responsible for making decisions and spending public money relating to provision of housing services. The Commissioner disputes that the post that the post does not have at least some significant public facing elements and he notes that there is evidence from external communications issued by the Council to support this argument. The Council has confirmed that Officer C had no involvement in the case involving the occupants of the property and therefore had no knowledge of the attendance by staff at the property in question. The Commissioner considers that it is likely that more senior officers would have some expectation that they would need to carry out their tasks transparently and be accountable for the decisions they take.
29. The Council advised that Officer A and Officer B were not consulted about disclosure, and that Officer C refused consent when consulted, as they did not wish their name to be disclosed. Although the Commissioner notes that one of the individuals has specifically refused consent to disclosure, he considers the fact that consent has not been provided by one of the data subjects in this case, does not, on its own, make any disclosure unfair.

b) Consequences of disclosure to the individual

30. The Council advise that the campaign group linked to the individuals who reside at the property in question are vociferous in their condemnation of public bodies and individuals, whose identity they become aware of. Based on its experience and correspondence with the various campaign groups on other matters associated with the occupants of the property, the Council are of the view that the information which has been published is somewhat distorted and disproportionate. Whilst the Council accepts that criticism of public authorities can be justified, it believes that the public condemnation of

members of staff who may have only had an innocent association with matters involving the occupants is disproportionate and unjustified. The Council believe that it is likely that, if the withheld information were disclosed, the names of the individuals would be published in connection with the subject matter and, as a result, the officers in question would suffer harm and distress by being inappropriately linked to the case involving the occupants, when they were simply carrying out their normal duties.

31. The Council provided the Commissioner with examples of the type of information which has been published on various websites or circulated on the street to members of the public outside Council offices or at public meetings relating to the occupants of the property. It is not the Commissioner's role to comment on the information which has been publicised about the individuals living at the property. The Commissioner notes that the information which has been publicised is of a highly sensitive nature and contains serious allegations about individuals and public authorities. Due to the personal and sensitive nature of the information, the Commissioner cannot make specific references to these examples in this Notice.
32. When considering the consequences of disclosure of the withheld information, the Commissioner has also considered how this data could be used by the public. Disclosure under the Act represents disclosure to the public at large. The Commissioner believes that there is a strong possibility that should the requested information be disclosed it will be published. In correspondence with the Commissioner, the complainant indicates that "the matter will remain out of the public arena until concluded". The complainant has made various allegations against the conduct of the Council, and individual officers working at the Council.
33. Based on the representations put forward by the Council, the Commissioner accepts that Officers A, B may suffer distress and possible harassment if their names were to be published in connection with matters involving the occupants of the property. The Commissioner finds that the impact on Officer C would be less, given the Council's explanation about the extent of her role in the matter. The Commissioner also notes that the name of the specific individual post for officer C (Head of Landlord Services) has already been disclosed.

c) General principles of accountability and transparency

34. 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.

35. The complainant has argued that the information requested should be made public given that it relates to public sector employees carrying out their duties. He has alleged that the entry to the property was illegal and criminal actions have been undertaken by the Council and its employees. The complainant believes that the DPA and the Act should not be used as a way of hiding the identity of public employees as a means of covering up criminal activity.
36. Whilst the Commissioner cannot adjudicate on the legality of the Council's actions or involvement in the entry to the property, he can take into account any allegations of wrongdoing or criminal behaviour insofar as they relate to the principles of promoting transparency and accountability. However, the public interest is only likely to be increased where there is some cogent evidence to support the allegations and where the information itself would go to support or refute the allegations or evidence.
37. The issue as to whether the Council acted illegally in relation to the entry to the property and the circumstances leading up to the entry to the property is a matter which could be referred to the Police to investigate. Further, the information requested in this case, ie the names of officers who attended the property, and their manager is unlikely to be a material consideration to support or refute the complainant's allegations that the entry was illegal.
38. The Council state that Officers A and B attended the property at the request of the Police. They were not involved or instrumental in any decision to enter the property in question and were carrying out their normal day to day duties by attending the property.
39. In view of the fact that none of the individuals who are the subject of this request had any involvement in the decision made to enter the property, the Council believe there is unlikely to be any legitimate public interest in their names being disclosed. In any case, the Council are of the view that any legitimate public interest in disclosure would be outweighed by the unwarranted harm and distress that the individuals would suffer by being associated with matters involving the occupants of the property, when they were merely carrying out their duties in meeting a request made by the Police to attend the property.
40. 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.

41. The Commissioner is satisfied that more junior employees (Officer A and Officer B) would be unlikely to expect that their names would be disclosed into the public domain through disclosure of this information under the Act. Given that junior employees are less likely to be accountable for decisions taken by a public authority, the Commissioner considers that the benefit to the public of disclosing this information is minimal. Rather, the Commissioner is of the view that disclosure of the names of Officer A and Officer B would be likely to draw undue attention to these individuals.
42. In relation to Officer C, whilst the Commissioner appreciates the fact that more senior staff should expect that some personal data will be disclosed, he accepts that, in this case, Officer C had no involvement in the decision to enter the property in question, and there is a limited legitimate public interest in knowing the name of this officer. However, the Commissioner notes that there is general public interest in the public being informed about the identity of a senior post holder, such as Head of Landlord Services.
43. While there may be a general public interest in accountability and transparency – for example, knowing the identity of Council staff who attended the property – the Commissioner has not identified any specific public interest in the withheld information being disclosed. The Commissioner also acknowledges that the public interest has, to an extent, been satisfied through information which the Council has already released - the department in which Officers A and B worked, and the job title of their reporting officer.
44. The Commissioner considers that in this case the general public interest in disclosure for the purposes of furthering accountability and transparency are outweighed by the reasonable expectations of the individuals and the consequences of disclosure. The Commissioner has therefore determined that in this case disclosure of the names of the relevant Council Officers A and B would be unfair and would breach the first data protection principle. As such, he considers that section 40(2) is engaged and that the Council was correct to withhold the information. He finds that the disclosure of Officer C's name would not be unfair, this is on the basis of the general expectations the Head would have had about being named as the post holder and the general public interest in the name of this post holder being named, rather than a specific public interest in learning her name in connection with the specific issues.

Schedule 2 condition 6 – Officer C

45. The Commissioner has considered whether schedule 2 condition 6 of the DPA would be met if Officer C's name was disclosed. Having considered the analysis above the Commissioner finds that disclosure would not prejudice the rights of the data subject, given the information already disclosed by the Council and the extent to which the Commissioner believes the post has a public facing role. The Commissioner considers that disclosure is necessary to meet a general legitimate public interest. Condition 6 is therefore met.
46. The Commissioner finds that section 40(2) does not apply to Officer C's name.

Procedural Requirements

Section 1/Section 10

47. The original request relating to Officers A and B were made on 22 September 2010 and repeated on 26 November 2010. The Council responded on 6 January 2011 and disclosed some information relevant to the request. In failing to provide this information within 20 working days of the request, the Council breached section 10(1) of the Act.

Section 17

48. The initial request was made on 22 September 2010 and the Council did not issue a refusal notice until 6 January 2011. In failing to respond to the request with a valid refusal notice within twenty working days of receipt, the Council did not comply with the requirements of section 17(1) of the Act.

The Decision

49. 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 applied section 40(2) in relation to the Officers A and B but not C.
50. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- In not providing Officer C's name the Council breached section 1(1)(b)
 - The Council breached section 10(1) for failing to provide the information disclosed on 6 January within 20 working days of the request.

- The Council breached section 17(1) of the Act for failing to provide a valid refusal notice within 20 working days of receipt of the request.

Steps Required

51. The Commissioner requires the Council to disclose the name of Officer C

Other matters

52. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern: - In order for a request for information to be valid under section 8 of the Act it is not necessary for an applicant to cite the Freedom of Information Act when making a request. Therefore any written request for information can constitute a request under the Act, provided that it includes a name and address for correspondence.
53. The requests to the Council of 22 September 2010 and 26 November 2010 were made in connection with previous requests which were submitted to the Council and dealt with under the provisions of the Act. The Commissioner is concerned that the Council failed to identify these two subsequent requests as valid Freedom of Information requests. This resulted in the Council issuing a late refusal notice. The Commissioner would expect public authorities to be able to recognise requests for information and handle them in accordance with the relevant legislation. He would therefore like to remind the Council of its obligations under the Act.

Right of Appeal

54. 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,
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

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Steve Wood
Head of Policy Delivery
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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

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 –

- (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)."

Data Protection Act 1998

Section 1 - Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires—
"data" means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

"data controller" means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

"data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

"data subject" means an individual who is the subject of personal data;

"personal data" means data which relate 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, 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;

"processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data

Schedule 1

The first data protection principle

"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."

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."