

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 February 2009

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

Summary

The complainant requested information concerning an investigation into, and subsequent resignation of, a former Head of Communications at the Council. Although the Council released some information, it refused parts of the request under section 40(2) of the Act. The Commissioner considers the Council is correct to withhold this information under section 40(2) and has therefore decided not to uphold the complaint. However, the Commissioner has found that the Council breached sections 17(1) of the Act but does not require the Council to take any action.

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. The complainant made a series of information requests against the backdrop of a proposal that the Council seek unitary status. During the time of the deliberations of the Council, a local radio station held a ballot about the issue. The former Head of Communications ("HOC") of the Council encouraged colleagues on how to vote in this ballot. The HOC also showed his colleagues how it was possible to vote in the ballot more than once by email. The HOC was suspended as a result and subsequently resigned before the Council could complete an investigation into his conduct.
3. The information requests focused on aspects of the investigation undertaken by the Council into the affair; what disciplinary actions, if any, the Council had taken

- against the HOC; and the manner of the HOC's resignation. The complainant had initially posed eight questions to the Council in correspondence received on 29 May 2007, with a further request made on 4 June 2007.
4. In correspondence of 25 June 2007, the Council provided the complainant with information to all but two of the requests. The Council argued that the information was personal data and therefore exempt from disclosure under section 40 of the Act.
 5. On the back of the information provided by the Council, the complainant repeated the two requests previously refused and made a further five requests in a letter dated 9 July 2007. The Council responded on 3 August 2007. In respect of the repeated two requests (referred to as parts ii) and iv) below), the Council again cited section 40 of the Act to justify withholding the information. Of the other five requests, the Council did supply some information to three of these. However, concerning the other two requests (subsequently referred to as requests i) and iii)) the Council also applied section 40 of the Act as grounds to withhold the information.
 6. The four requests, as set out in the correspondence of 9 July 2007 and refused by the Council under section 40 of the Act, are as follows:
 - i) "However the investigation was carried out, what was the outcome?"
 - ii) "If before [the investigation had been completed] was there any condition attached to the resignation?"
 - iii) "...what disciplinary action was taken if [the HOC] was guilty of any offence?"
 - iv) "...was any additional payment made to [the HOC]?"
 7. On 22 August 2007, the complainant wrote to the Council seeking confirmation of the subsection of section 40 the Council had engaged, the Council having omitted the citation in its refusal notices. The complainant also expressed his dissatisfaction at the Council's position not to release all of the required information.
 8. The Council responded in correspondence dated 29 August 2007, informing the complainant that it had withheld the information under section 40(2) of the Act. The correspondence reaffirmed the Council's position that to release the information would be unfair to the HOC, in that it would breach the first principle under schedule 1 of the Data Protection Act 1998 (the "DPA").
 9. The complainant subsequently chose to appeal the Council's decision, completing the Council's 'Comments, Compliments and Complaints Form' on 15 October 2007. In its internal review, the Head of Legal Services of the Council

reiterated that section 40(2) of the Act applied and the Council would therefore not disclose the information. The Council stated that, if the complainant was unhappy with its decision, the complainant could appeal to the Commissioner.

The Investigation

Scope of the case

10. On 25 October 2007, 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 point:

“...if [the HOC] is guilty of any offence or breach of employment rules, then this is information that should be in the public domain...”
11. Following the intervention of the Commissioner, the complainant has confirmed that the information sought in respect of iii) and iv) of the requests has been provided. Accordingly, the scope of this notice has been limited to requests i) and ii).
12. In respect of part i), the Commissioner understands that the complainant is seeking information that would indicate the extent of the Council's investigation at the time of the HOC's resignation. Regarding part ii) of the requests, the complainant has stated that he wishes to view the terms of any condition attached to the resignation of the HOC.

Chronology

13. In a telephone call of 23 May 2008, the Commissioner informed the Council that he would require further information about the circumstances of the case. In the interests of clarity and accuracy, the Council asked the Commissioner to document any queries he had.
14. The Commissioner emailed the Council later the same day, asking the Council to provide some background information to the case, including:
 - the manner in which the HOC had tried to influence the phone-in ballot;
 - the scope of the Council's investigation into the HOC's conduct, indicating if any other issues were part of the investigation;
 - whether any third-parties, namely regulatory bodies, had been notified of the HOC's actions.

The Commissioner did not feel it was necessary to examine copies of documentation directly relating to the investigation into the HOC's conduct, nor to view the condition attached to his resignation. In essence, the Commissioner has judged that the issue of disclosure revolved around a point of principle, namely the entitlement of the HOC to privacy, rather than the substantive content of the information.

15. On 6 June 2008, the Council replied to each of the points raised by the Commissioner. The Council also attached a copy of the email sent by the HOC to his colleagues in the course of encouraging them to vote. Amongst other information provided, the Council stated that:
 - no disciplinary action was taken by the Council against the HOC. Although an investigation had been initiated this was not completed due to the resignation of the HOC; and
 - the HOC had not received any additional payment.
16. The Commissioner wrote to the Council again on 10 June 2008. The Commissioner agreed that information pertaining to i) - iv) of the requests was personal data for the purposes of the DPA and may therefore be subject to section 40(2) of the Act. However, the Commissioner suggested to the Council that some information relevant to the requests could be released that would not contravene section 40(2).
17. Regarding parts iii) and iv) of the requests, the Commissioner advised the Council that it could answer the questions directly as this would not breach the first principle of the DPA. Specifically, the Commissioner informed the Council that he considered it reasonable to disclose the information referred to in paragraph 15 to the complainant.
18. Concerning part i) of the requests, and again in reference to paragraph 15, the Commissioner felt that the Council could justifiably state that it had not reached an outcome to its investigation due to the resignation of the HOC. In respect of part ii), the Commissioner considered that it was fair to confirm that the HOC's resignation had an attached condition.
19. However, the Commissioner informed the Council that, in line with the first principle of the DPA, further disclosure of information relating to parts i) and ii) would not be supported where an investigation into the HOC's conduct was not completed.
20. In a telephone call of 17 June 2008, the Council represented its concerns to the Commissioner that the disclosure of information should not breach the DPA. The Council also requested that the Commissioner confirm that the complainant still wanted to pursue his complaint. The Commissioner verified the complainant's wish to progress his case in a telephone call the same day and the Commissioner later relayed this to the Council.
21. On 19 June 2008, the Council emailed the complainant additional information concerning requests i) - iv), in line with the Commissioner's advice as set out in paragraphs 17 and 18. Subsequently, the Commissioner telephoned the complainant on 27 June 2008 to confirm whether he had viewed the information. The complainant told the Commissioner that he had received the email, but expressed his unhappiness with the answers provided to parts i) and ii) of his requests.

22. On 1 July 2008, the Commissioner sent the complainant correspondence setting out his preliminary findings. The Commissioner concluded the document by stating his belief that the Council had now discharged its obligations under the Act. Following receipt of the correspondence, the complainant informed the Commissioner, in a telephone call of 4 July 2008, that he wished to pursue parts i) and ii) of the requests.

Analysis

Procedural matters

Section 17(1) - Refusal of request

23. The full text of this section can be found in the legal annex but, in summary, section 17(1) provides that a public authority must clearly explain which exemption it is relying on to withhold information, and why.
24. In its refusal notices of 25 June 2007 and 3 August 2007, the Council cited section 40 of the Act as the grounds of its decision to withhold information. However, the Council failed to specify the subsection of section 40 that it would later come to rely on in its internal review. Similarly, the Council did not set out substantial arguments as to why the exemption applied.
25. Whilst the Council had remedied these failures by the time of its internal review, the Commissioner has found the Council in breach of section 17(1) of the Act for the original lapses.

Exemption

26. When considering whether the Council had correctly engaged an exemption of the Act, the Commissioner has proceeded on the principle that the disclosure of any information would be to the world at large.

Section 40(2) - Personal information

27. The Commissioner has judged that similar considerations for disclosure are required for parts i) and ii) of the request. Consequently, the Commissioner has not separated the arguments presented here.
28. The Council has stipulated that the withheld information constitutes the personal data of the HOC and to release it would contravene his rights under the DPA. The Council has therefore engaged the exemption given under section 40(2) of the Act.
29. Section 40(2) of the Act 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 section (1), and
- (b) either the first or the second condition below is satisfied.”

The first condition is satisfied where disclosure of the personal information would contravene either one or more of the data protection principles as set out in schedule 1 of the DPA, or section 10 of the DPA (the right to prevent processing likely to cause damage or distress).

The second condition is satisfied where the personal information would be exempt from disclosure to the data subject (the person to whom the data relates) under the DPA.

- 30. The Commissioner has initially considered whether the information would constitute personal data. It is clear that the direction of the enquiries made by the complainant is directly about the economic and social identity of the HOC. The Commissioner has therefore accepted that the information is the personal data of the HOC for the purposes of the DPA.
- 31. Having determined that the information sought constitutes personal data, section 40(2) then dictates that the Commissioner assess whether disclosure of information would constitute a breach of a data protection principle. The Commissioner has considered that the relevant principle in this case was the first principle. This requires the processing of personal data to be both fair and lawful. The Commissioner's considerations here focus on the general issue of whether disclosure would be fair to the HOC.

Fair Processing

- 32. When assessing whether disclosure of the requested information would be fair, the Commissioner took into account the obvious but competing interests that would influence the Commissioner's decision-making on this matter. On the one hand is the promotion of transparency in the workings of a publicly accountable authority, and particularly information about a senior-ranking employee. On the other is the competing interest that defends an individual's right to privacy.
- 33. In weighing up these interests, the Commissioner noted the nature of the requested information itself. Both parts i) and ii) of the requests relate to matters that would be highly personal to the HOC. Information relating to an investigation into the conduct of an employee may be the subject of great anxiety to the individual concerned. In addition, the terms of a resignation will form part of a critical negotiation process with an employer.
- 34. In his guidance, the Commissioner has drawn a distinction between information about the public and private life of an employee of a public authority. The Commissioner has emphasised that disclosure of information should normally only relate to an employee's public functions, where decisions or actions may be accountable to the population they serve. However, the Commissioner feels that he could not draw such a clear distinction in this case. The delicate and personal

nature of the information would extend beyond information about the HOC's official capacity as a public servant and into the private concerns of the HOC.

35. The Commissioner has therefore recognised that the HOC would expect the safeguarding of his personal information, not least as the HOC has not given his consent for disclosure. However, the Commissioner is also mindful that the HOC's expectation alone may not preclude the possibility that disclosure of the information is fair under the Act.
36. The Commissioner has no doubt that, as a senior employee of the Council, the HOC would have recognised that his actions would be subject to a greater level of scrutiny. Previous Decision Notices issued by the Commissioner have taken the line that there should be a lower expectation of privacy when information concerns a senior member of staff. In addition, the manner of the HOC's conduct has been publicised in various media sources that inevitably will have fuelled public speculation on the matter.
37. Consequently, the Commissioner has acknowledged the cogent argument that suggests that the criticised conduct of the HOC, coupled with the HOC's position in the Council, should weigh in favour of disclosure.
38. However, the Commissioner appreciates that even amongst senior staff there is an assumed right to privacy between an employee and employer in respect of disciplinary matters. Likewise, the Commissioner understands that contractual conditions would engender the same kind of expectation of confidentiality.
39. Crucially, the Commissioner is aware that the Council has not formally determined whether the HOC was culpable of any serious act of maladministration. As a result, the Commissioner considers that the HOC has not had the full opportunity to input into this process and therefore to defend himself against any charges.
40. Moreover, there is a difference between the attempt by the HOC to influence a radio ballot and any attempts to affect, for example, an official electoral survey. Sending an ill-advised email could be a matter of poor judgement rather than someone pursuing a course of serious wrongdoing or corruption.
41. In the case of request ii), the inclusion of a confidentiality clause in the terms of resignation further cements the HOC's expectation of privacy. The Commissioner accepts that, in principle, a confidentiality clause should not prove to be a complete bar on disclosure of information. Nevertheless, the Commissioner recognises that an explicit confidentiality clause can strengthen the argument against disclosure.
42. Ultimately, the Commissioner has felt that he must strike a balance between transparency and an employee's reasonable expectations to privacy. Accordingly, the Commissioner has encouraged the release of some information relating to requests i) - iv) in recognition of the senior position of the HOC.

43. However, the Commissioner has decided that to support further disclosure relating to request i) and ii) would inappropriately shift this balance. The Commissioner believes that disclosure would unjustifiably impinge into the HOC's private life and would invade the HOC's right to freely set out, or agree to, the terms of his resignation to an unwarranted extent.
44. The Commissioner realises that public authorities have a duty to properly regulate the behaviour and actions of their employees. Yet, the Commissioner feels that disclosing information on the grounds of an incomplete disciplinary investigation would be unreasonable. The Commissioner recognises that such disclosure could jeopardise the trust that an employee may have with their employer that allows a free and frank working relationship; a trust that rests on an employee's expectation that their employer will protect their personal data.
45. The Commissioner has therefore concluded that it would be unfair to the HOC to disclose the information and so would contravene the first principle of the DPA. As disclosure would not be fair, the Commissioner has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.

The Decision

46. 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 has complied with the Act by correctly withholding the information (namely, parts i) and ii) of the requests) under section 40(2) of the Act.

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

The Council has contravened section 1(1) and 10(1) of the Act by failing to communicate all suitable information to the complainant by the completion of its internal review. In addition, the Council failed to comply with section 17(1)(b) of the Act by not identifying the relevant subsection of section 40 when issuing its refusal notice. The Council also breached section 17(1)(c) of the Act by failing to elaborate on the reasons why section 40 should be engaged in this particular case

Steps Required

48. The Commissioner requires no steps to be taken.

Right of Appeal

49. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 17th day of February 2009

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Section 17 of the Act

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.”

Section 40 of the Act

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.”

Schedule 1 of the DPA

The first principle of the DPA 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.”