

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 October 2009

Public Authority: Bramshott and Liphook Parish Council
Address: Haskell Centre
Midhurst Road
Liphook
Hampshire GU30 7TN

Summary

The complainant requested information about whether ex gratia payments had been made by the public authority and if so when the decision was made and how much for. The public authority initially neither confirmed nor denied that it held the information, claiming that the information was personal data. The authority later wrote to the complainant confirming an ex gratia payment had been made but refused to give details of date or amount. The Commissioner found that the information was not personal data and ordered the release of the 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. The complainant requested the following information in a letter received by the public authority on 22 August 2007:
 - 1). Confirmation or denial of any decision being made by Council concerning ex-gratia payments made to Parish Council employees since 1st April 2007.
 - 2). If confirmed, the amount decided and
 - 3). When such a decision was made

3. The public authority provided a response to the complainant on 6 September 2007 in which it refused to confirm or deny that the information was held and stated section 17(4) of the Act applied.
4. The complainant queried the application of section 17(4) in his letter of 7 September 2007 as he did not understand how an exemption within sections 21-44 applied to the information he was requesting and sought an internal review. In a further letter dated 9 October he queried the application of section 40 or 41 as he does not consider the disclosure would assist in identifying an individual or constitute a breach of confidence.
5. The public authority responded in a letter dated 30 October 2007 that it considered the exemption valid as “any information relating to an individual which may be held by Bramshott and Liphook Parish Council under a duty of confidentiality is personal data and exempt from disclosure under the Data Protection Principles. The Parish Council neither confirms nor denies the existence of any information mentioned in the disclosure request contained in your letter of 10 August 2007 as it is satisfied that the admission or denial of the existence of any such information will not be necessary to comply with its obligations under the Freedom of Information Act 2000.”

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 19 January 2008 complaining about the way his information request had been handled by the public authority. The complainant specifically asked the Commissioner to consider the exemption applied by the public authority as he did not understand how the information he was seeking could be personal data.
7. The investigation considered whether the public authority applied the Freedom of Information Act 2000 correctly and whether the exemption applied.

Chronology

8. The Commissioner wrote to the public authority on 13 November 2008 requesting a copy of the withheld information and clarifying that the exemption which had been applied as section 17(4) had been quoted to the complainant but not supported by an exemption in Part II of the Act.
9. The public authority replied on 1 December 2008 supplying a copy of the withheld information, supporting documents and an explanation that following advice from East Hampshire District Council and the Commissioner's Office, they had concluded that the information was personal data and exempt under section 40 of the Act. Furthermore the public authority decided to neither confirm nor deny the

existence of the information as it was felt confirmation would lead to the individual being identified because of a limited pool of staff.

10. The Commissioner wrote to the public authority on 11 December 2008 to clarify a number of things and the public authority replied on 16 December 2008 and again on 9 January 2009 with supporting documents. The Commissioner wrote to the public authority on 9 February 2009 to question the assumptions made by the public authority and to clarify the definition of personal data. The public authority replied on 20 February 2009 stating that the public authority had written to the complainant on the same day confirming that an ex gratia payment had been made in the financial year 2007/8, but had not disclosed when the decision was made or the amount.

Findings of fact

11. In correspondence with the public authority, the Commissioner learnt that the public authority has 11 employees. There are 3 "office" staff positions, who the public authority explained have most to do with the public on a day to day basis, as well as groundstaff and a cleaner.
12. The public authority provided the Commissioner with a copy of the statement of accounts for the year to 31 March 2008, submitted to the Audit Commission. This showed staff costs of one amount, as "total expenditure or payments made to and on behalf of all council employees" which was defined as "salaries and wages, PAYE and NI (employees and employers), pension contributions and related expenses". There was also a figure for total other payments described as "total expenditure of all payments as recorded in the cashbook less staff costs and loan interest/capital repayments".

Analysis

Procedural matters

13. In the procedural analysis the Commissioner has looked at the actual way the public authority responded to the request for information, leading to breaches of the Act. In addition to this there are breaches as a result of the public authority not applying the Act correctly. This is examined and explained in detail later in the decision of the Commissioner.

Section 1

14. A person making a request for information to a public authority is entitled under section 1 to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.
15. The public authority responded to the request for information by neither confirming nor denying that the information was held. As described later, the

Commissioner finds that the information should have been released. Accordingly the public authority is found to be in breach of section 1(1)a and section 1(1)b as confirmation that the information was held was not provided until after the Internal Review.

Section 10

16. As described later the Commissioner finds that the information should have been released. He therefore finds that the public authority was in breach of Section 10(1) of the Act in failing to comply with Section 1(1) in not confirming that the information was held within the statutory timeframe.

Section 17(1)

17. Section 17 of the Act provides that a public authority must issue a refusal notice promptly and in any event not later than the twentieth working day following the date of receipt; and that where a request for information is refused upon the basis of an exemption the public authority must explain what exemption(s) have been relied upon.
18. The public authority did not state to the complainant in its refusal notice which exemption in Part II of the Act applied or explain why it applied. It initially refused to confirm or deny that the information was held, but later supplied some of the information. Accordingly the Commissioner finds that the public authority failed to comply with its obligations under section 17(1)(a),(b) and (c) of the Act.

Exemption

Section 40(2)

19. The public authority argued that the requested information constitutes the personal data of the recipient(s) of any ex gratia payment(s) that may have been made. The complainant does not understand how an individual can be identified from the information he has requested.

Is the information personal data

20. Personal data is defined in section 1 of DPA as data

“which relate to a living individual who can be identified from those data or those and other information in the possession of or which is likely to come into the possession of the data controller and includes expressions of opinions about the individual and indications of the intentions of any other person in respect of that individual”.

21. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: “Determining what is personal data” which can be accessed at:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf 37.

22. From his guidance there are two questions that need to be answered in the affirmative when deciding whether the information, if disclosed to the public, would constitute the personal data of individuals:
- (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?*
23. It is clear that information relating to the nature of ex gratia payments if linked to identifiable individuals is the personal data of those staff members. The question to be determined is whether a living individual can be identified from this specific data if the information is disclosed to the public.
24. The Commissioner considers that truly anonymised data is not personal data and thus there is no need to consider the application of the data protection principles. The Commissioner considers that even where the data controller holds the additional 'identifying' information, this does not prevent them from anonymising that information to the extent that it would not be possible to identify any living individual from that information alone and thus it would no longer be personal data. The test of whether information is truly anonymised is whether a member of the public could identify the individuals by cross-referencing the data with information or knowledge already available to the public. This approach is supported by paragraphs 24 and 25 of Lord Hope's judgement in the House of Lords' case of the Common Services Agency v Scottish Information Commissioner (2008) UKHL 47,
- "..Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection."*
25. The public authority claimed that the recipient(s) could be deduced from questioning the employees, as there was a limited pool. However the Commissioner does not agree. The potential pool of employees is 11 and he is satisfied that there are sufficient employees for the beneficiary(ies) to remain anonymous as evidence suggested that there was no obvious reason why any one of the employees was more likely to receive an ex gratia payment than any other.
26. The public authority were concerned that releasing the information would put them in breach of a confidentiality agreement(s). However the Commissioner does not agree as doing so would not reveal what the payment was for or to whom the payment was made.

27. The Commissioner is therefore satisfied that the information does not constitute personal data. This means that Section 40(2) is not engaged and he does not need to consider the application of the Data Protection Act.

The Decision

28. The Commissioner's decision is that the following elements of the request were not dealt with in accordance with the Act:

The Commissioner finds the public authority in breach of section 1(1)(b) for incorrectly refusing to make the requested information available by the date of the internal review.

The Commissioner finds the public authority in breach of section 10(1) for failing to provide the requested information within 20 working days.

The public authority did not inform the complainant upon which exemption it was relying when it issued the refusal notice and incorrectly refused to confirm or deny that the information was held, therefore breaching sections 17 (1)(a), 17(1)(b) and 17(1)(c) of the Act.

The public authority incorrectly applied section 40 (2) and withheld the information.

Steps Required

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

The public authority should release the requested information to the complainant.

30. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

31. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

32. 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.
Website: www.informationtribunal.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 7th day of October 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

1. **Section 1** provides that

- (1) 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

2. **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 a request

3. **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.”

4. **Section 17(2)** states –

“Where –

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

5. **Section 17(3)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

6. **Section 17(5)** provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

7. **Section 17(7)** provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Personal information

8. **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.”

9. **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.”

10. **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.”

11. **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).”

12. **Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

- (i) he 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 that Act were disregarded, or (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

13. **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.”

14. **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.

15. **The first data protection principle** provides –

“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.”