

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 June 2009

Public Authority: London Borough of Enfield
Address: Civic Centre
Silver Street
Enfield
EN1 3XJ

Summary

The complainant submitted a series of requests to the public authority which were mainly focused on housing issues relating to the 'Edmonton Partnership Initiative' regeneration project and as a consequence of the responses received made several complaints to the Information Commissioner ("the Commissioner"). On 13 July 2006 the complainant requested information relating to the reason and duration of suspension of [a named employee]. The complainant alleged that the public authority failed to respond to this request. Following intervention by the Commissioner, the public authority confirmed that it did hold information of the description specified but refused to disclose the information on the basis that it was personal data and disclosure would breach the Data Protection Act 1998. The public authority also refused to disclose this information on the basis of section 41. The Commissioner has reviewed the requested information and has decided that the public authority correctly applied section 40(2) in this case. In view of this, the Commissioner did not consider the public authority's application of section 41. The Commissioner did however find procedural breaches of sections 1(1)(a), 10(1), 17(1) and 17(1)(b) of the Act as the public authority did not respond to the request within the statutory time frame and did not fully cite the exemption but he does not require any action to be taken.

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 13 July 2006, the complainant wrote to the public authority requesting the following information:
 - i) "Reason for suspension & duration of suspension of [a named employee]?"
3. This request was followed by three others which the Commissioner has investigated separately under case reference FS50209143.
4. As the complainant has made a series of requests and complaints regarding the Edmonton Partnership Initiative to the public authority since early 2004 there is a great deal of correspondence between the two which displays the inability of the parties to reach a settlement on the issues. Not all of these pieces of correspondences are relevant to the complaints made to the Commissioner and so are not recorded here.

The Investigation

Scope of the case

5. On 12 October 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Due to the interrelated nature of the complaints it has been difficult to extrapolate the specific thread of complaint usually associated with freedom of information requests. This has been further complicated by the public authority's attempt to deal with the requests in the normal course of business and not follow the specific steps related to freedom of information requests. The complainant was unable to isolate a specific complaint but simply wished the commissioner to investigate the fact that the requests had allegedly been ignored, or at least, not substantially answered.
6. The Commissioner is considering the outcome to part i) of the request made on 13 July 2006 in this decision notice.

Findings of fact

7. As a result of submissions from the complainant, the Commissioner identified six different complaints between the parties requiring their own investigation. This has generated a substantial amount of cross referenced and interrelated correspondence.
8. The information held falling within the scope of the request is a compromise agreement and suspension letter.

Chronology

9. As stated above, due to the involved and related nature of the complaints involving these parties, there is a large volume of correspondence. The Commissioner does not consider it necessary or beneficial to detail each of these communications but has instead chosen to highlight those relevant for consideration in this case.
10. The interrelated nature of the complaints and correspondence has led to confusion as to which of the numerous requests had been answered. The Commissioner was not helped by the complainant being unable to clearly identify which requests had been dealt with.
11. The initial request was made on 13 July 2006. The Commissioner was unable to identify a specific response provided to the complainant prior to his intervention.
12. In a letter dated 3 June 2008 the public authority informed the complainant that [a named employee] left the Authority's employment in a redundancy situation. It stated that the terms and circumstances of [a named employee's] departure are covered by a mutual confidentiality agreement and that it is not prepared to provide any further information surrounding the departure. The public authority stated their reliance on the exemptions under section 41, information provided in confidence disclosure of which would constitute an actionable breach of confidence, and section 40, personal data not belonging to the complainant.
13. The Commissioner on 29 January 2009 requested that the public authority provide him with a copy of the withheld information in order for the validity of the exemption to be assessed. After assuring the public authority that the information would not be released to the complainant or any other third party on 25 February 2009, the Commissioner received a copy of the Compromise Agreement between [a named employee] and the public authority on 3 March 2009.
14. On 26 March 2009 the Commissioner telephoned the public authority to query which clauses of the Compromise Agreement were relevant to the request and whether there was any additional information of the description specified. The Commissioner confirmed this request in a letter dated 27 March 2009 and also pointed to the conditions that must be met in order for the exemption at section 40(2) of the Act to apply.
15. The public authority provided the Commissioner with a copy of a suspension letter and its arguments as to why the exemption at section 40 of the Act applied to the information on 14 April 2009. The public authority submitted that only paragraphs 3.1 and 3.2 of the Compromise Agreement are within the scope of the request, that the information is plainly personal data and disclosure would contravene the data protection principles for the following reasons:
 - [a named employee] had not and would not consent to the release of the information.
 - Although the complainant, as a taxpayer, has a legitimate interest in knowing whether the public authority is conducting itself lawfully, he does not have any legitimate interest in knowing whether an allegation has been made against an

officer where that officer has not had an opportunity to respond in the course of a disciplinary process.

- The position is similar to that considered by the Commissioner in Decision Notice FS50181762 where the prejudice to the data subject of the allegation being made public where the matter had not been fully investigated would be unwarranted.
- [a named employee] is bound by the terms of the Compromise Agreement not to make any statement relating to the circumstances surrounding the termination of the employment and would therefore have no way of defending himself/herself if the allegation were to be made public. His/her reputation and prospect of future employment would be reduced without justification.

The arguments advanced by the public authority are discussed below in the analysis section.

Analysis

Procedural matters

16. The full text of the relevant legal sections can be found in the legal annex.
17. The complainant submitted his request on 13 July 2006. The public authority only responded to the request by supplying a refusal notice after intervention by the Commissioner and almost 2 years after the date of the request. Therefore the Commissioner considers that the public authority breached section 1(1)(a) for not informing the complainant that recorded information was held within the statutory time period, section 10(1) of the Act by failing to respond to the request within the statutory time period, and section 17(1) for not supplying a refusal notice within the statutory time period. The refusal notice, when supplied, also didn't specify the subsection of the exemption in question which is a breach of section 17(1)(b).

Exemption

Section 40

18. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 ("DPA"). (The relevant sections of section 40 are included in the legal annex attached to this notice).
19. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

“...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 intention of the data controller or any other person in respect of the individual”.

20. The public authority has submitted that the withheld information is personal data and having reviewed the information the Commissioner is satisfied that it falls within the description of personal data as defined by the DPA. This is because [a named employee] is the focus of the withheld information and can be clearly identified from it. Furthermore, the information also consists of indications of the intentions of the public authority in relation to [a named employee's] employment.
21. The public authority has argued that the information is exempt from disclosure because to do so would breach the first data protection principle.
22. The first data protection principle has two components:
 1. Personal data shall be processed fairly and lawfully and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
23. The full text of the first principle and a list of Schedule 2 conditions are included in the legal annex.
24. There are six conditions in Schedule 2, but only condition 1 (consent) or condition 6 (legitimate interests) should be relevant to disclosure under the Act. The Commissioner agrees with the public authority that condition 1 is not relevant, as [a named employee] has not consented to the release of the information.
25. Therefore, the only other basis on which the data could be lawfully disclosed would be if Condition 6 was met. This states that:

“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.”
26. The Commissioner's awareness guidance on the exemption for personal data states that following the Tribunal decision in *Corporate Officer of the House of Commons v Information Commissioner and Leapman, Brooke and Thomas* (EA/2007/0060 etc; 26 February 2008) public authorities should approach condition 6 as a three-part test:
 1. there must be a legitimate public interest in disclosure;
 2. the disclosure must be necessary to meet that public interest; and
 3. the disclosure must not cause unwarranted harm to the interests of the individual.

27. The Commissioner acknowledges that there is a legitimate public interest in disclosure of information which would inform the public as to whether the council and its senior officers has conducted itself lawfully and in this instance the Commissioner accepts that disclosure of the withheld information would be necessary to meet that public interest.
28. However, the Commissioner agrees with the position proposed by the public authority that although the complainant as a taxpayer has a legitimate interest in knowing whether [a named employee] has conducted himself/herself lawfully, disclosure would cause an unwarranted prejudice to the rights, freedoms or legitimate interests of [a named employee] for the reasons set out in the following paragraphs.
29. The public authority has stated that the issue which led to [a named employee's] suspension was never fully investigated by the public authority. Although the public authority conducted a preliminary investigation, essentially the issue was not fully investigated because matters were overtaken by a redundancy situation. As the issue was never fully investigated to the point of a substantive conclusion, [a named employee] did not have the chance to formally defend himself/herself against the allegations made about him/her. Therefore, the Commissioner agrees with the public authority that it would be unfair to disclose the information relating to reasons for the suspension.
30. In considering this point the Commissioner has considered the public authority's argument that disclosure of the requested information would be prejudicial to [a named employee's] interests. The Commissioner accepts that given that [a named employee] did not have the opportunity to defend himself/herself against the issue that led to suspension, disclosure could lead to unwarranted damage as his/her reputation would be affected and his/her prospects of gaining employment in any capacity would be reduced without justification.
31. The public authority informed the Commissioner that when [a named employee] and the public authority parted company both parties entered into a compromise agreement which set out the terms of [a named employee's] departure. The Commissioner recognises the important role that compromise agreements can play in employer/employee relationships. Such agreements can avoid the time, expense and stress of litigation in an Employment Tribunal where an employer/employee relationship breaks down. By entering into compromise agreements public authorities can save significant amounts of public money by avoiding the need for costly and lengthy litigation. The Employment Rights Act 1996 established the opportunity for parties to enter into a compromise agreement such as that entered into here. This Act has built in safeguards into the compromise agreement process which ensure that employees receive independent and accountable legal advice before entering into such agreements.
32. The Commissioner believes that the right to access official information under the Act and the right to reach an equitable compromise in private in an employment dispute are not mutually exclusive. Therefore, when a public authority decides to enter into such an agreement with a senior executive, the Commissioner considers that a balance has to be struck between a public authority's duty to be

transparent and accountable and that authority's duty to respect their former employee's reasonable expectations of privacy.

33. In respect of this point, the Commissioner's guidance on section 40 makes it clear that the seniority of the official should be taken into account when personal data about them are being requested under the Act;

"You should also consider the seniority of their position, and whether they have a public facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair."

34. In this case the Commissioner appreciates that the requested information relates to the departure of a senior executive. However, the public authority has drawn the Commissioner's attention to a binding confidentiality clause not to;

"make or publish any statement to a third party concerning this Agreement, the dispute settled by it or the circumstances surrounding termination of the Employee's employment".

35. On the basis of this confidentiality clause the Commissioner has concluded that it is reasonable that [a named employee] would not have expected details surrounding his/her departure to be disclosed and consequently to do so would be unfair.

36. Furthermore, the Information Tribunal in *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038)* considered similar conditions and the decision made supports this case. The Tribunal, in considering the concept of fairness under the first Data Protection Principle, held that it was;

"necessary to consider in terms of fairness what would be [the data subject's] reasonable expectations about the use and subsequent release of the material".

37. The Tribunal also held that;

"there is a recognised expectation that the internal disciplinary matters of an individual will be private".

38. As in the current case, in *EA/2008/0038*, the settlement agreement between the public authority and the data subject included a confidentiality agreement which limited the information that would be made available to the public about the termination of his employment. The Tribunal held that that this gave rise to;

"a reasonable expectation that no further information would be released".

39. Following the decision in the *House of Commons v Information Commissioner and Norman Baker (EA/2006/0015 and 0016)*, the Tribunal concluded that the legitimate interests of the public in accessing the requested information were not

sufficient to outweigh the data subject's right to privacy, particularly given the substantial detriment that would result from disclosure.

40. The Commissioner also upholds the public authority's submission that the position is similar to that considered by the Commissioner in Decision Notice FS50181762 where the prejudice to the data subject of the allegation being made public where the matter had not been fully investigated would be unwarranted. The Commissioner does however acknowledge that the circumstances are different in this particular case although the same reasoning can be applied.
41. In conclusion, the Commissioner believes that the public authority has correctly applied section 40(2) to the withheld information because disclosure would breach the Data Protection principles. The Commissioner has concluded that the rights and interests of [a named employee] outweigh the legitimate public interest in disclosure. In reaching this conclusion the Commissioner has given particular weight to two points. Firstly, the fact that the issue leading to the suspension of [a named employee] was never fully investigated and secondly, the right [a named employee] has under the Employment Rights Act 1996 to reach a compromise agreement with his/her former employer and that the terms of that agreement remain private.
42. As the Commissioner has concluded that the withheld information is exempt from disclosure by virtue of section 40(2), he has not considered whether any of the information is in fact exempt by virtue of section 41.

The Decision

43. The Commissioner's decision is that the public authority was correct to rely on section 40(2) of the Act as a basis to withhold the requested information.
44. However, the Commissioner has also decided that the public authority breached section 1(1)(a), section 10(1) and section 17(1) of the Act by failing to respond within the statutory time limit and section 17(1)(b) for failing to cite the relevant subsection of the exemption.

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. 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 2nd day of June 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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

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

Schedule 1

The first principle states 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”.

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.”