

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 May 2010

Public Authority: Vale of Glamorgan Council
Address: Civic Offices
Holton Road
Barry
CF63 4RU

Summary

The complainant requested information relating to consultants employed within the Council's Education Service Area during the financial year 2008/2009. The Council refused to provide the information requested by virtue of section 43 of the Act. During the course of the Commissioner's investigation the Council also sought to rely on the exemption contained at section 40(2) of the Act. The Commissioner has investigated and found that sections 43(2) and 40(2) are not engaged and accordingly has ordered the release of the information. The Commissioner has also 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. On 31 March 2009, the complainant wrote to the Vale of Glamorgan Council ('the Council') and requested:

"....a breakdown on the cost of employing consultants in each of the council's departments during the 2008/09 financial year. In addition, I would be grateful if you could provide information on the number of consultants employed in each department during 2008/09 and the highest daily fee charged by a consultant in each department during the financial year.

In addition, I would be grateful if you could detail the overall cost of employing consultants in the 2007/08 financial year".

3. The Council responded to the request on 13 May 2009, providing details of the number of consultants employed in each department and the overall costs for the financial year 2008/2009, broken down by department. The Council stated that it did not hold information relating to the highest daily fee charged by a consultant.
4. On 15 May 2009 the complainant contacted the Council and requested "...a full breakdown for the Education Service Area figure of £46,000 for the 2008/09 financial year".
5. The Council responded to the complainant on 18 May 2009 providing the names of the two consultants employed within its Education Service Area and details of the work the consultants were employed to carry out.
6. On 19 May 2009, the complainant wrote to the Council expressing her concern at the lack of information provided in relation to her request. The complainant suggested that the consultants in question would have submitted invoices for the work carried out and, as such, the Council should have been able to calculate the daily fee charged by each of them.
7. Following a series of further exchanges between the Council and the complainant, on 3 June 2009, the complainant requested the following information in relation to the two consultants employed in its Education Service Area during the financial year 2008/2009:
 - "The number of days each consultant worked at the Vale council during 2008-09
 - The total bill submitted by each of the two consultants, detailed separately".
8. The Council responded to the request on 16 June 2009 stating that the information requested was exempt by virtue of section 43 of the Act, as disclosure was likely to prejudice the commercial interests of other

parties. The Council also considered that the public interest in maintaining the exemption outweighed the public interest in disclosure.

9. On 30 June 2009, the complainant requested an internal review of the Council's decision not to disclose the information requested.
10. On 16 September 2009, the Council provided the outcome of its internal review and upheld its decision not to release the information requested. The Council maintained the view that the information was exempt under section 43 of the Act.

The Investigation

Scope of the case

11. On 14 October 2009, the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information she had requested should be disclosed.
12. On 19 February 2010, the Commissioner wrote to the Council and the complainant confirming that the scope of his investigation would focus on the information requested on 3 June 2009, as detailed in paragraph 7 of this Notice.

Chronology

13. On 13 November 2009, the Commissioner wrote to the Council to confirm that the complaint had been deemed eligible for formal consideration and requested copies of the withheld information.
14. The Council wrote to the Commissioner on 11 December 2009 providing copies of the withheld information and further representations to support its view that the information requested was exempt from disclosure. In this letter, the Council introduced its reliance on section 40 as well as section 43 in respect of the withheld information.
15. The Commissioner therefore widened his investigation to consider whether section 40 applied to the withheld information.
16. On 17 February 2010 the Commissioner contacted the complainant who confirmed that her complaint to the Commissioner was in relation to her information request dated 3 June 2009.

17. The Commissioner wrote to the Council on 19 February 2010 and requested clarification of the reasoning behind its application of sections 40 and 43. The Commissioner also asked the Council to confirm the subsection(s) of section 40 and 43 it had relied on.
18. The Council responded to the Commissioner on 19 March 2010 confirming that it was relying on sections 43(2) and 40(2). The Council also provided further representations in respect of its application of these exemptions.

Analysis

Section 43 – Commercial Interests

19. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Full details of the relevant legislation relevant to this case are reproduced in the attached legal annex.
20. For the Commissioner to agree that section 43(2) of the Act is engaged, the Council must first demonstrate that prejudice would or would be likely to occur to the commercial interests of the Council and/or the consultants concerned. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council* (EA/2005/0030) ('Hogan') the tribunal stated that:

"The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."
21. When considering the nature of the prejudice, the tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

22. As stated in paragraph 20 above, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; “would be likely to prejudice” and “would prejudice”. The first limb of the test places a lesser evidential burden on the public authority to discharge. “Would be likely to prejudice” was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The tribunal stated that:
- “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk”.
23. The second limb of the test “would prejudice” places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner’s view that prejudice must be at least more probable than not.
24. Once the prejudice test is satisfied, the Council needs to apply the public interest weighing up the arguments for and against disclosure.

Whose interests would be prejudiced in this case?

25. The Council has confirmed that, in its view, the applicable interests relevant to disclosure in this case are its own and the consultants’ interests. However, it has been difficult to establish from the Council’s responses whether it is claiming that disclosure would or would be likely to prejudice its own or the consultants’ commercial interests, and as such the Commissioner will consider the lower threshold; “would be likely to prejudice”. If this threshold is not met, it follows that the higher threshold of “would prejudice” would not be met either.

The Council’s own interests

26. The Commissioner asked the Council to confirm which of the two limbs it was claiming (as described in paragraphs 22 and 23 above) was relevant to disclosure of the information requested in this case. The Council’s response was that it believed disclosure could prejudice its own interests. The Council also stated that disclosure would allow third parties the ability to ascertain the hourly rate charged to the Council and to interpret the figures as a baseline for future negotiations, which could “keep costs up” and thereby prejudice its interests.

27. The Commissioner is not persuaded by the Council's arguments that disclosure of the information requested would be likely to set a baseline for any future negotiations and "keep costs up". In the Commissioner's view, any third party seeking to tender for any consultancy work with a public authority will seek to submit the most competitive tender as it is in their interests to do so. In addition, the Commissioner considers that although some contracts may be similar in nature, they will not be the same and different factors will be taken into account when pricing and awarding future contracts.
28. In conclusion, the Commissioner does not accept that disclosure would be likely to prejudice the Council's own interests by setting a baseline for any future contracts the Council enters into with any third party.

The Consultants' interests

29. The Council advised that, in respect of its application of section 43, it "considered that this would factually apply to the circumstances as clearly the information related to the financial affairs of the individuals concerned and its release would be likely to prejudice them". Further, the Council has argued that if the information is disclosed it would provide the consultants' competitors with a commercial advantage, in that they would have details of the consultants' charges.
30. The Council confirmed that following the information request dated 3 June 2009 it sought the views of both consultants in question. One of the consultants considered that disclosure would lead to prejudice as it would provide their competitors with a commercial advantage. The consultant provided the following statement to the Council :

"It [disclosure of the information] would effectively disclose my earnings to the enquirer. Since I am not an employee of the Vale of Glamorgan my role is not subject to public scrutiny this would be inappropriate as this is again personal information under the Data Protection Act".

The other consultant did not provide any views regarding disclosure.

31. The Commissioner notes that whilst one of the consultants objected to disclosure, he/she has not provided any representations to clarify how disclosure would prejudice his/her commercial interests, or any evidence regarding the likelihood of such prejudice occurring. He/she has simply referred to any disclosure as being inappropriate under the Data Protection Act.

32. Whilst the Commissioner notes that one of the consultants objected to disclosure of this information, this fact alone is not sufficient to engage this exemption. The Commissioner would expect the consultants to still demonstrate how disclosure would be likely to prejudice their commercial interests.
33. It is the Commissioner's view that any external company or third party wishing to tender for public sector contracts should by now be aware that public authorities are subject to the Act, are open to public scrutiny and should expect some information they submit to be disclosed to the general public, particularly when this information concerns the utilisation of public funds. There is a strong public interest in transparency in relation to the use of public money and ensuring that public authorities are achieving the best price for work that it outsourced to external companies.
34. In relation to openness and transparency of public funds, the Council stated that the two consultants were utilised whilst two Heads of Service posts were vacant. In relation to value for money the Council advised that:

"the position for the year is that the total consultancy costs were £46,344 in circumstances where the savings which accrued from the two vacant Heads of Service posts in the same period was £105,202 [based on salary midpoint], plus on-costs".

In the Council's view, this statement, in conjunction with the information previously disclosed in relation to the total amount received by the consultants and details of the work carried out, ensures proper accountability can be achieved without disclosure of the number of days each consultant worked and the total amount paid to each consultant.

Summary of the Commissioner's position

35. The Council did not provide the Commissioner with any firm arguments to support its view that disclosure would be likely to prejudice the consultants' or the Council's own interests. The Council simply referred to the information contained within its refusal notice of 16 June 2009, the findings of its internal review of 16 September 2009 and its letter to the Commissioner dated 11 December 2009.
36. The Commissioner notes that the Council has already disclosed some relevant information. However, it is the Commissioner's view that the Council has not, to date, submitted any convincing arguments to demonstrate how disclosure of the rest of the requested information in

this case would be likely to prejudice the commercial interests of the consultants concerned or the Council itself. For this reason, the Commissioner has concluded that section 43(2) is not engaged.

37. As the Commissioner has concluded that section 43(2) is not engaged in this case, there is no need to go on and consider the public interest test.

Section 40 – Personal data

38. 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 sections of the legislation are reproduced in the attached legal annex.

Late application of the exemption

39. In this case the Commissioner recognises that the Council did not apply section 40(2) by the time it had completed its internal review of its decision not to disclose the requested information. The Commissioner therefore considered whether he should accept the Council's submissions about the application of an exemption after it had had the opportunity to respond to the request and review that response. The Commissioner has the discretion to accept the late application of exemptions where the circumstances of the particular case present a reasonable reason to do so. He notes that the new exemption was relied on within the first exchange of correspondence with the Commissioner and was done so proactively. He therefore has decided that he will consider the public authority's arguments about the application of section 40(2) in this case.
40. The Commissioner's discretion to accept arguments when the exemptions have been applied late has been confirmed by the Information Tribunal in *Bowbrick v Information Commissioner* at paragraph 51, where it was confirmed that the Commissioner had discretion under the Act to look at section 40 issues when considering cases under the Act (even where it had not been cited by the public authority):

'If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the

public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects....Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.'

41. The Commissioner agrees that as he is the Regulator of the Data Protection Act, he should consider data protection issues where they arise on the facts of the case. This provides further reasoning about why he has used his discretion to consider section 40(2) in this case.

The Council's view

42. The Council considers that the information requested constitutes the personal data of the two consultants and disclosure would breach the first and second data protection principles.
43. The Council stated that the information was provided to it by way of invoices raised by the consultants in order to arrange payment in respect of the work undertaken. The Council's view is that "processing for the purpose of providing this information to a third party would be unfair to the individuals and incompatible with that purpose".
44. The Council advised the Commissioner that information relating to this information request had been referred to in a local newspaper which subsequently published an article regarding the matter¹. As such, the Council believes it important to bear in mind that any further disclosure would also be similarly distributed.
45. The Council considers it would be unfair to the consultants in question to disclose the information requested given that they were "simply providing contractual services to one area of the Council". The Council believes it is doubtful that the individuals would have anticipated or had any reasonable expectation of such publicity in respect of their services. The Council further argues that:

"...given the current climate of data protection compliance, across the public sector we [the Council] are particularly concerned that the release of this information could be viewed as inconsistent with data protection requirements".

¹ <http://www.walesonline.co.uk/news/wales-news/2009/07/08/plaid-am-leanne-wood-hits-out-at-vale-council-91466-24099436/> http://findarticles.com/p/news-articles/south-wales-echo-cardiff/mi_7993/is_2009_July_2/council-consultants-cash-row/ai_n38256107/

46. The Council also argues that disclosure of the information requested would be unlawful as it would “breach the requirement of the legitimate expectation on the part of the individuals that this information would be not be released into the public domain”.
47. As stated in paragraph 30 above, the Council sought the views of the consultants in question and it is clear that one of the consultants has not consented to disclosure. The Council considers that this may constitute a notice under section 10 of the DPA. Such a notice would require a data controller not to process an individual’s personal information if that processing would, or would be likely to, cause substantial unwarranted damage or distress to the individual.

The complainant’s view

48. As the Council did not introduce its reliance on section 40 until after the Commissioner had commenced his investigation, the complainant has not had the opportunity to specifically comment on its application of this exemption. However, in her complaint to the Commissioner the complainant argued that the information requested should be made publicly available in the same way that information about successful tenders is available for public scrutiny.
49. The complainant is of the view that whilst the consultants were not direct employees of the Council, any contractor working for a public body should expect some level of scrutiny in respect of work undertaken. The complainant states that without disclosure of the information requested (i.e. a further breakdown of the total bill of £46,244 covering both consultants), she is unable to judge whether the Council has achieved value for money.

The Commissioner’s view

Is the requested information personal data?

50. Section 1 of the DPA defines personal data 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.
51. The withheld information in this case comprises details of the number of days worked and the total bill submitted by each of two individual named consultants employed within the Education Service Area in the

Council during the financial year 2008/2009. The focus is clearly on these two consultants, whose names have previously been disclosed to the applicant. The Commissioner therefore considers that the information requested is their personal data.

Would disclosure contravene any of the data protection principles?

52. As the Commissioner is satisfied that the information requested constitutes the personal data of the consultants, the next question for him to consider is whether disclosure would breach any of the data protection principles. As stated in paragraph 41 above, the Council has claimed that disclosure of the withheld information in this case would breach the first and second data protection principles.

The first data protection principle

53. The first data protection principle 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.”

54. In this context, ‘processing’ is construed broadly and includes disclosure of the information requested. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered the fairness aspect. He has then considered whether there a Schedule 2 condition can be met, and finally whether such a disclosure would be lawful.

Fairness

55. 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 individual. He has then balanced against these the general principles of accountability, transparency and legitimate public interest.

a) Expectations of the individuals concerned

56. As stated in paragraph 44 above, the Council advised the Commissioner that some details of this information request have been published in the local press, which includes the names of the two consultants and the total spend on consultants within its Education

Service Area in the financial year 2008/2009. The Council's view is that the individual consultants would not have anticipated nor had any reasonable expectation of such publicity in relation to their services.

57. The Commissioner's awareness guidance on section 40² suggests that when public authorities consider the disclosure of third party personal data, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules it states that:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

58. The Commissioner's guidance on the section 40 exemption therefore makes it clear that where the information relates to the individual's private life (ie their home, family, social life or finances), as opposed to their public life (ie their work as a public official or employee), it will deserve more protection than information about them acting in an official or work capacity.
59. In his guidance on the section 40 exemption, the Commissioner suggests, 'if the information requested consists of names of officials, their grades, jobs or functions or decisions made in their official capacities, then disclosure would normally be made'. However, the Commissioner also considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information relates to an employee's professional life, and not their personal life.
60. As previously stated in this Notice, the Commissioner considers that any individual who enters into a contract with a public authority should be open to scrutiny and accountability because their roles are funded by the public purse and they should therefore expect to have some personal data released. This is because the Commissioner considers that the basis upon which public authorities award financial contracts should generally be open to a certain level of scrutiny to ensure accountability. Therefore, those companies or individuals who are awarded such contracts cannot expect to receive payment for such

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

contracts without the basis upon which they were awarded being open to some degree of public scrutiny.

61. Therefore, the Commissioner believes that the consultants in this case should have expected, when they entered into the contract, that some information regarding the contractual arrangement may have been disclosed into the public domain. However, the Commissioner accepts that this does not mean they would necessarily have expected detailed information about payments made to them to be disclosed.
62. In light of the above, the Commissioner understands that the individuals may have had a reasonable expectation that not all the information relating to their contract with the Council would be disclosed. However, in the Commissioner's view this does not automatically mean that disclosure of the information requested would be unfair.
63. The Commissioner acknowledges that neither consultant has consented to disclosure of the information requested and that one consultant has specifically refused consent. However, the Commissioner considers the fact that consent has not been provided by the data subjects in this case, does not, on its own, make any disclosure unfair.
64. The Commissioner does not consider the letter from the consultant in which he/she refuses consent to constitute a section 10 notice under the DPA. This is because the letter does not identify any substantial unwarranted damage or distress which disclosure would, or would be likely to cause the individual.

b) Consequences of disclosure to the individuals

65. The Commissioner considers that the payments made to each individual consultant and the number of days worked constitutes information about their work life. However, he recognises that a person's income relates to an individual's private life as well as their work life and is more private than, for example, details of work undertaken in a professional capacity.
66. However, in the circumstances of this case he does not consider that the payment information is likely to reveal the actual financial circumstances of the individuals. This is because the information relates to payments by way of fees over a limited number of months to carry out a specific role and does not necessarily reveal the total income of the consultants; for example, the consultants could have received income from other sources in relation to work carried out for other organisations.

c) General principles of accountability and transparency

67. The Commissioner believes there is a legitimate public interest in disclosure of information which would promote accountability and transparency in the spending of public money. There is also a legitimate public interest in assessing the amount of money a public authority has spent on consultants, and whether it has achieved value for money in respect of such expenditure. The Commissioner also considers that there is a general public interest in public authority processes such as employment of consultants to be as transparent as possible.
68. The Council argue that this legitimate interest has already been met by the public disclosure of other information, and in particular, the total amount spent on consultants in its Education Service Area for the financial year in question, and details of the work they were employed to carry out. However, the Commissioner does not consider that publication of this information alone satisfies the public interest in disclosure of the information requested. The proportion of money allocated to each individual consultant and the number of days worked will assist the public in understanding whether the Council obtained value for money and to determine whether the money was well spent. The Commissioner therefore considers that disclosure of the information requested would satisfy this public interest.
69. The Commissioner has weighed the nature of the expectations and the consequences of disclosure in this case against the legitimate public interest in disclosure and considers that releasing the information requested would not be unfair.

Schedule 2 Condition 6 of the DPA

70. There are six conditions in Schedule 2 of the DPA, but only condition 1 (consent) or condition 6 (legitimate interests) would usually be relevant to disclosures under the Act. The Commissioner considers that the relevant condition in Schedule 2 in this particular case is the sixth condition. This condition 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”.

71. The Commissioner's awareness guidance on section 40 states that following the Information 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.

72. As stated in paragraphs 67 and 68, the Commissioner considers there is a legitimate public interest in the disclosure of any information which would promote accountability and transparency in either the spending of public money and in assessing whether it has achieved value for money in respect of such expenditure on consultants.

73. As explained in paragraph 68 above, the Commissioner considers that disclosure of the information requested is necessary to satisfy this public interest as it would provide a more detailed breakdown into the money spent on consultants which will allow the public to assess whether the Council has achieved value for money.

74. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects (i.e. the consultants). The Commissioner accepts that the data subjects in this case (i.e. the consultants) would not necessarily have had any expectation that this level of information would be disclosed into the public domain. However, given the fact that the information requested relates to the individuals' public lives and that the Commissioner does not consider disclosure would reveal the total income of each consultant (as detailed in paragraph 66), he does not consider that any significant prejudice would arise for the individuals concerned. The Commissioner therefore maintains that disclosure would not represent an unwarranted interference into the individuals' private lives

75. On balance, the Commissioner accepts that disclosure of the information requested would be necessary for a legitimate interest of the public and considers that this outweighs any unwarranted prejudice that might be caused to the individuals' own rights, freedoms and legitimate interests.

Lawfulness

76. In the context of freedom of information requests, the Commissioner considers it is likely that it will be unlawful to disclose personal information where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence. In the current case he has seen no evidence that any of these breaches would occur, and as a consequence he has concluded that disclosure would not be unlawful.
77. For the above reasons, the Commissioner is satisfied that disclosure of the withheld information would be neither unfair nor unlawful, and therefore disclosure would not breach the first data protection principle.

The Second Data Protection Principle

78. The second data protection principle provides that personal data shall be processed only for one or more specified and lawful purposes. The argument of the Council is that disclosure here would be incompatible with the purpose for which this information was collected. The Council stated that the information requested was provided to it through invoices raised by the consultants that detailed the number of days worked and the appropriate fees. The Council's view is that this information was provided to it for the purposes of authorising payment for work carried out and disclosing such information to a third party would be incompatible with the purpose for which it was collected.
79. The Commissioner does not consider the disclosure of personal data in response to a Freedom of Information request to be a specific purpose for which information is processed. In responding to such a request a public authority is not fulfilling one of its business purposes; it is simply complying with a legal obligation. It would be difficult to argue that, as a rule, compliance with a legal obligation, such as that imposed by the Act, would be incompatible with the other purposes for which personal data may be processed. Therefore the Commissioner rejects the argument that a disclosure in response to a Freedom of Information request would, in itself, breach the second data protection principle.
80. As he does not consider that any of the data protection principles would be breached by disclosure, the Commissioner is not satisfied that the information requested was correctly withheld by the Council under section 40(2) of the Act.

Procedural Requirements

Section 10

81. As the Commissioner has decided that the withheld information is not exempt from disclosure under sections 40(2) and 40(3)(a)(i) the Commissioner believes this information should have been provided to the complainant in line with the duty at section 1(1)(b). By failing to provide this information within 20 working days of the request the Council breached section 10(1).

Section 17

82. The Commissioner also finds that the Council breached section 17(1)(b) in that the refusal notice issued on 16 June 2009 did not specify the relevant subsection of section 43 on which the Council was relying. The Commissioner notes that this failure was not corrected in the Council's internal review response dated 16 September 2009.
83. During the Commissioner's investigation, the Council sought to rely on section 40(2) in respect of the request. As a result of the late claiming of this exemption, the Council breached sections 17(1)(a), (b) and (c) in its handling of the request. The Commissioner also finds that section 17(1) was breached as the Council failed to apply this exemption within the statutory time limit for complying with section 1(1).

The Decision

84. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:
- i. It incorrectly applied section 43(2) to withhold the information requested.
 - ii. It incorrectly applied section 40(2) to withhold the information requested.
 - iii. It breached section 10(1) for failing to provide the information requested within 20 working days of the request.
 - iv. It breached section 17(1)(b) for failing to specify the subsection of section 43 on which it was relying in its refusal notice.
 - v. It breached sections 17(1)(a), (b) and (c) for late reliance on section 40(2) during the Commissioner's investigation.

- vi. It breached section 17(1) as it failed to apply section 40(2) within the statutory time limit for complying with section 1(1).

Steps Required

85. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - To disclose the information previously withheld under sections 43(2) and 40(2), namely the number of days worked and the total bill submitted by each of two individual named consultants employed within the Education Service Area in the Council during the financial year 2008 to 2009.
86. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

87. 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.

Other matters

88. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
89. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit time scale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case

should the time taken exceed 40 working days. The Commissioner therefore expresses his concern that it took over 50 working days for an internal review to be completed in this case.

Right of Appeal

90. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 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 10th day of May 2010

Signed

**Anne Jones
Assistant Commissioner**

**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.”

The second data protection principle

“Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.”

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."

Section 43 – Trade Secrets and Commercial Interests

Section 43 (1) provides that –

"Information is exempt if it constitutes a trade secret".

Section 43 (2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Section 43 (3) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."