

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 09 May 2011

Public Authority: The Electoral Commission
Address: 3 Bunhill Row
London
EC1Y 8YZ

Summary

The complainant made a request for information relating to the public authority's investigation of the activities of a number of candidates in a local election. The public authority confirmed that it held relevant information, but refused to disclose it under sections 30(1)(a), 31(1)(g) together with 31(2)(a), and 40(2). During the investigation the public authority accepted that some of the withheld information was the personal data of the complainant, and this was disclosed to him. After investigating the case the Commissioner decided that some more of the withheld information was the personal data of the complainant. This information is therefore exempt from disclosure under section 40(1), and should instead be considered for disclosure under the Data Protection Act 1998. In relation to the remaining withheld information, the Commissioner decided that this is exempt from disclosure under section 40(2). The Commissioner considers that the public authority also failed to meet the requirements of section 17.

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 wrote to the public authority on 27 June 2009 and made the following request,

"...I would now like full details of the investigation that was carried out about the expenses of each of six candidates in the East Lindsey District Council Election when a flyer was produced and distributed in six wards.

I fail to see how a correct conclusion can have been made that all was correct when to date one of the six has failed to send in his expense form. I am far from satisfied that your department has looked into the complaint that I have made about this matter and request full details gathered from your investigation."

3. The public authority acknowledged receipt of the request on 7 July 2009. On 29 July 2009 it wrote to the complainant again and informed him that it was unable to respond to his request as it was still evaluating the public interest in relation to sections 30 and 31 of the Act.
4. The public authority wrote to the complainant again on 6 August 2009. It confirmed that it held information relevant to the request, but stated that it believed that this information was exempt under sections 30(1)(a), 31(1)(g), 31(2)(a) and 40(2).
5. Following an exchange of correspondence the complainant wrote to the public authority on 11 June 2010 and requested an internal review.
6. The public authority carried out an internal review, and responded in a letter dated 6 July 2010. It informed the complainant that it believed that the information in question was exempt under sections 30(1)(a) and 31(1)(g).

The Investigation

Scope of the case

7. On 9 July 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. During the course of the investigation the Commissioner noted that the public authority had considered that the request only in relation to its investigation of the actions of one individual in the local election in question. He wrote to the public authority and noted that the withheld information, together with other information provided to him by the

complainant (notably a report from the Parliamentary and Health Service Ombudsman) indicated that it had also investigated a second individual following allegations made by the complainant. The public authority confirmed that it had investigated a second individual as a result of allegations from the complainant, but it had interpreted the request as only relating to its investigation of one individual.

9. The Commissioner then wrote to the complainant and asked him to confirm whether his request focused on the public authority's investigation of the first individual only, or whether his request was in relation to its investigation of the second individual as well. The complainant confirmed that his request had been in relation to both of the individuals identified by the Commissioner. For ease of reference the Commissioner has referred to these individuals as "the named individuals" throughout the rest of this notice. It should be noted that although the original request refers to an investigation of six candidates, neither the complainant nor the public authority referred to any other individual throughout the course of the Commissioner's investigation.
10. During the course of the investigation the public authority disclosed some of the previously withheld information. Most of this disclosed information was, in fact, the personal data of the complainant. In relation to the outstanding information, the public authority confirmed that it was withholding this under sections 30(1)(a), 31(1)(g) together with 31(2)(a), and 40(2) .
11. Therefore the scope of this case has been to consider whether the public authority was correct to rely upon sections 30(1)(a), 31(1)(g) together with 31(2)(a), and 40(2) to withhold the outstanding information in relation to its investigations into the named individuals. In addition to this, the Commissioner has also considered whether any of the outstanding withheld information constitutes the personal data of the complainant.

Chronology

12. The Commissioner wrote to the public authority on 10 November 2010 and asked for a copy of the withheld information. He also asked it to provide him with submissions to support its use of sections 30 and 31, and to specify which exemption it was applying to which part of the withheld information. He noted the reference in the refusal notice to section 40(2), and asked it to confirm whether it was also seeking to rely upon this exemption in relation to any of the withheld information. If so, he asked it to provide further submissions to support this. He asked for a response by no later than 10 December 2010.

13. The public authority contacted the Commissioner by email on 25 November 2010. It informed him that it anticipated that it would not be able to meet this deadline for a response, but that it would provide a response by the end of December or if possible sooner.
14. The Commissioner emailed the public authority on 6 January 2011 and noted that he had not yet received a substantive response. He informed the public authority that unless he received a response by no later than 21 January 2011 he would consider issuing an information notice under section 51 of the Act. The public authority acknowledged receipt of this email on the same day.
15. The public authority emailed the Commissioner on 21 January 2011 and informed him that it was unable to provide a substantive response by the deadline he had given. It informed him that it expected to provide a response shortly.
16. The Commissioner emailed the public authority on 24 January 2011 and informed it that he would not grant a further extension to the deadline for a response. He would therefore issue an information notice under section 51 of the Act. This was confirmed in a telephone conversation with the public authority on the same day.
17. The Commissioner issued an information notice on 24 January 2011. This required the public authority to provide the information set out in the notice within 30 days.
18. The public authority responded on 18 February 2011 and provided a copy of the withheld information (although this only related to its investigation of one of the named individuals). It confirmed that it was relying upon sections 30, 31 and 40(2) to withhold it, and provided arguments to support its use of these exemptions. Additionally, it also informed the Commissioner that it had now decided to disclose some of the withheld information to the complainant, and provided the Commissioner with a copy of this information. The public authority wrote to the complainant on the same day and provided him with a copy of this information. The Commissioner has noted that some of the information that was disclosed at this point was, in fact, the personal data of the complainant.
19. The Commissioner wrote to the public authority on 24 February 2011 and asked some additional questions. In particular, after examining the withheld information he noted that it focused on the public authority's investigation of only one of the named individuals. He noted the wording of the request and asked whether it had carried out any investigations into any other individuals on the basis of the complainant's allegations, and if so, whether it held any further information relating to those

investigations. If it did, he considered that this would also come under the scope of the request. He also noted that the withheld information contained references to two telephone calls and asked whether it held any telephone notes relating to those calls. Furthermore he considered that some of the remaining withheld information might also constitute the personal data of the complainant. He asked the public authority to reconsider this information (as the personal data of the complainant) and to disclose it, or provide him with further submissions as to why it should not be disclosed to the complainant.

20. The public authority responded on 17 March 2011. In response to the Commissioner's questions about the scope of the request, it informed him that it had considered that the request related to its investigation of only one of the named individuals. It had also investigated a second individual on the basis of the complainant's allegations, but stated that it had not interpreted the scope of the request to relate to this information as well. It confirmed that it held a telephone note for one of the telephone conversations referred to by the Commissioner and provided him with a copy of it. It did not hold a note of the other as none had been created. It also provided a copy of two further documents which it was withholding, but which had not been previously been provided to the Commissioner. It also provided submissions to support its use of section 40(2). Finally, it agreed that the information identified by the Commissioner was the personal data of the complainant. It informed him that it was now prepared to disclose this to the complainant, and would notify the Commissioner when this had been done.
21. The Commissioner wrote to the public authority on 22 March 2011 and asked it to confirm whether it had now made this disclosure to the complainant. He also stated that after considering the withheld information further he now considered that two more of the documents constituted the personal data of the complainant and asked the public authority whether it was now prepared to disclose this information. In relation to the scope of the request, he informed it that it was his opinion that the information that it held in relation to its investigation into both of the named individuals would fall under the scope of the request. Therefore he asked it to provide him with a copy of the information it held in relation to its investigation of the second named individual. He asked it to confirm whether any of this information constituted the personal data of the complainant, and (if not) to provide its submissions as to why this information should be withheld. He asked for a response by no later than 5 April 2011.
22. The public authority responded on the same day. It confirmed that it had now disclosed a copy of the document identified by the Commissioner (in his email dated 24 February 2011) as the complainant's personal data. It also noted the Commissioner's

comments in regard to the two further documents which he believed constituted the personal data of the complainant (referred to in his email dated 22 March 2011), and stated that it would review these documents. In regard to the Commissioner's comments about the scope of the request it disputed whether the complainant was also seeking access to the information it held about its investigation into the second named individual. It asked the Commissioner to contact the complainant to clarify this point.

23. The Commissioner contacted the complainant on 23 March 2011, and informed him that the public authority had stated that his request had been for information relating to one of the named individuals only. He asked the complainant to confirm whether this was the case, or whether he was also seeking access to the information it held about its investigation into the second named individual. The complainant contacted the Commissioner on the same day and confirmed that he was seeking access to the information about the other named individual as well.
24. The Commissioner contacted the public authority again on the same day, and informed it that the complainant had confirmed the wider scope of his request. Therefore he asked it to provide him with a copy of the information it held in relation to its investigation of the second named individual, whether any of this information constituted the personal data of the complainant, and (if not) to provide its submissions as to why this information should be withheld. He again asked for a response by no later than 5 April 2011.
25. The public authority contacted the Commissioner in a telephone call on 25 March 2011 and asked for an extension to this deadline until 12 April 2011. The Commissioner agreed to this new deadline.
26. The public authority responded on 11 April 2011, and provided him with a copy of the withheld information relating to its investigation of the second named individual. It informed the Commissioner that it had now disclosed some of this information to the complainant, and provided him with a copy of the bundle that it had now disclosed. In relation to the remaining information it held about its investigation of the second named individual it confirmed that it was relying upon sections 30, 31 and 40(2) to withhold it. In relation to the two documents identified by the Commissioner as the complainant's personal data (see paragraph 21) it agreed that one of these did constitute his personal data, and informed him that it had now disclosed this to the complainant. However, in relation to the other document identified by the Commissioner, the public authority disputed that this was the personal data of the complainant, and refused to disclose this information.

Analysis

Exemptions

27. The public authority has relied upon sections 30, 31 and 40(2) to withhold the remaining withheld information on this case. This information relates to its investigations into the two named individuals.
28. However, before reaching a view on the application of these exemptions to the withheld information the Commissioner has first considered whether any of this information constitutes the personal data of the complainant. Therefore he has first considered whether section 40(1) applies to any of the outstanding withheld information.

Section 40(1) – Personal data of which the applicant is the data subject

29. Under section 40(1), requested information that constitutes the personal data of the applicant, as defined in the Data Protection Act 1998 (the "DPA"), is exempt from disclosure under the Act. The effect of this is to remove all of the individual's personal information entirely from the regime of the Act, leaving it subject instead to the information access regime of the DPA. Section 7 of the DPA gives individuals the right to request access to personal data held about them by data controllers. This is referred to as the right of subject access. Section 40(1) is an absolute exemption, and therefore requires no public interest test to be conducted.
30. The full text of section 40 can be found in the legal annex attached to the end of this notice.
31. Section 1 of the DPA defines personal data as information about a living individual who can be identified from that information, or from that information and other information which is in the possession of, or is likely to come into the possession of, the data controller.
32. The Commissioner has first considered whether any of the withheld information is the personal data of the complainant.
33. The Commissioner accepts that most of the withheld information does not constitute the complainant's personal data. However, he notes that some of the withheld information consists of information redacted from file notes of telephone conversations between the public authority and the complainant. These documents are identified in the confidential annex attached to the end of this notice.

34. The Commissioner notes that this information records details of the complainant's interaction with the public authority, and details of the complainant's allegations. Bearing this in mind, the Commissioner is satisfied that the complainant is the focus of this information. Therefore, the Commissioner finds that the information redacted from these two file notes is the personal data of the complainant and is therefore exempt by virtue of section 40(1) of the Act.
35. In relation to the remaining withheld information, the Commissioner has gone on to consider whether the public authority was correct to withhold this information under section 40(2).

Section 40(2) – Personal data of third parties

36. The public authority has confirmed that it believes that the withheld information is exempt from disclosure under sections 40(2) and 40(3), as disclosure of this information would breach the principles of the DPA. Bearing this in mind the Commissioner considers that the public authority has applied sections 40(2) and 40(3)(a)(i) to this information.
37. Section 40(2) provides an exemption for information which 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.
38. The condition listed at section 40(3)(a)(i) applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. This is an absolute exemption, and is therefore not subject to a public interest test.
39. In order to establish whether section 40 has been correctly applied the Commissioner has first considered whether the withheld information contains the personal data of third parties.
40. As noted above, section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified from that information, or from that information and other information which is in the possession of, or is likely to come into the possession of, the data controller.
41. After considering the withheld information the Commissioner is satisfied that it relates to the public authorities investigations into allegations against the named individuals, and their activities in relation to a local election. He is satisfied that the named individuals are identifiable from this information, and that they are the focus of this information. Bearing this in mind, the Commissioner considers that the withheld information is the personal data of the named individuals.

42. The Commissioner has gone on to consider whether the withheld information is also sensitive personal data. Section 2 of the DPA defines sensitive personal data as personal data relating to, amongst other things, the commission or alleged commission by an individual of any offence.
43. In this instance the public authority has explained that its investigations into the two named individuals were in order to ascertain whether they had committed an offence under section 84 of the Representation of the People Act 1983.
44. Bearing this in mind, and after considering the withheld information, the Commissioner is satisfied that the withheld information constitutes the sensitive personal data of the named individuals.
45. As noted above, sections 40(2) and 40(3)(a)(i) provide an exemption for information which is the personal data of third parties, the disclosure of which would breach the data protection principles under the DPA. In this case the public authority has stated that the disclosure of the withheld information would be in breach of the first data protection principle.
46. The first principle states that personal data shall be processed fairly and lawfully and 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 Commissioner has first considered whether the disclosure of this information would be fair.

47. The Commissioner's approach is that where information constitutes sensitive personal data disclosure of that information will in most circumstances be unfair. By its very nature, sensitive personal data has been deemed to be information that individuals regard as the most private information about themselves. Further, the Commissioner considers that disclosure of this type of information is likely to have a detrimental or distressing effect on the subjects of this information (i.e. the named individuals).
48. The Commissioner has also taken into account the particular circumstances of this case and in doing so has considered the expectations of the individuals concerned. The public authority has argued that it is most unlikely that either of the named individuals would have reasonably expected that this information would be put into the public domain by way of disclosure under the Act. Bearing in mind the fact that this information relates to investigations of allegations of

criminal behaviour, and that neither investigation resulted in a hearing, the Commissioner finds this argument persuasive. Therefore the Commissioner considers that it would be unfair to disclose the requested information. As such, the Commissioner concludes that this information is exempt from disclosure under sections 40(2) and 40(3)(a)(i).

49. As the Commissioner has found that all the withheld information on this case is exempt under either sections 40(1) or 40(2) and 40(3)(a)(i), he has not gone on to consider the public authority's application of sections 30 and 31.

Procedural Requirements

Section 17

50. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within twenty working days 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.
51. Section 17(2) provides that a public authority may extend the time limit where it is still considering the public interest after 20 working days, as long as certain measures are taken. Where any additional time beyond the initial 20 working days is required, the public authority must still serve a 'refusal notice' under section 17(1) of the Act within 20 working days of a request even in those cases where it is relying on a qualified exemption and has not yet completed the public interest test; state the exemption(s) being relied on and, if not apparent, the reasons why they apply; and give an estimate of the date by which the final decision will be reached.
52. In this case, the request was made on 27 June 2009. The public authority wrote to the complainant on 29 July 2009 and stated that it required additional time in order to consider the public interest test in relation to sections 30 and 31. It informed the complainant that it intended to respond shortly. However, it did not provide an estimate of the date by which it expected to be able to reply.
53. The public authority provided a full response to the complainant on 6 August 2009, informing him that it believed that the requested information was exempt from disclosure under sections 30 and 31. It

also informed the complainant that it was relying upon section 40(2), stating,

"Some of the information the Commission holds contains personal data as defined in section 1(1) of the Data Protection Act 1998 [...] between the Commission and yourself as a complainant and correspondence with third parties and is exempt from disclosure under section 40(2) of the Act."

54. The Commissioner notes that the public authority's letter to the complainant informing him, under section 17(2), that it was still considering the public interest test was sent 23 working days after the request was made. By failing to send this notice to the complainant within twenty working days, the public authority failed to meet the requirements of section 17(1).
55. Although the public authority informed the complainant that it was seeking to rely upon section 40(2), the Commissioner notes that the public authority did not fully specify, in either the refusal notice or the internal review, which of the conditions of section 40(3) it believed was satisfied. In failing to do this, the public authority did not comply with the requirements of section 17(1)(b). In addition to this, the Commissioner considers that the public authority did not provide an adequate explanation as to why this exemption applied. Therefore, the public authority also failed to meet the requirements of section 17(1)(c).
56. Finally, the Commissioner considers that the public authority did not meet the requirements of section 17(2) by failing to provide an estimate of the date by which it expected to be able to reply.
57. The full text of section 17 can be found in the legal annex at the end of this notice.

The Decision

58. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - It correctly relied upon sections 40(2) and 40(3)(a)(i) to withhold some of the requested information.
59. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The information redacted from the two documents identified in the confidential annex was exempt from disclosure under section 40(1) of the Act. The public authority should have identified this information as the personal data of the complainant, and should have dealt with the request for this information as a subject access request under section 7 of the DPA. However the Commissioner has not ordered any remedial steps.
- The public authority also failed to meet the requirements of section 17.

Steps Required

60. The Commissioner requires no steps to be taken.

Other matters

61. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. The Commissioner notes that part of this request should have been dealt with as a subject access request, under section 7 of the DPA from the outset, and he would encourage public authorities to consider requests under the correct access regime at first instance.

The Commissioner will now conduct an assessment under section 42 of the DPA to determine whether the complainant has a right of access under section 7 of the DPA to the information he has decided is exempt by virtue of section 40(1). The outcome of that assessment will be communicated to the complainant in due course.

Right of Appeal

62. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

63. 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.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 9th day of May 2011

Signed

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

Legal Annex

Section 17

- (1) 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.
- (2) 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.
- (3) 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.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) 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.
- (6) Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) 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.

Section 40

- (1) 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.
- (2) 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.
- (3) 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.
- (4) 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).
- (5) 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) the 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 the 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).

(6) 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.

(7) 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."