

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 14 June 2011**

**Public Authority:** Sturminster Newton Town Council  
**Address:** Council Offices  
Old Market Hill  
Sturminster Newton  
Dorset  
DT10 1FH

### **Summary**

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The complainant requested an explanation of an entry in the Council's financial statements labelled as "employment advice". The Council refused the request under sections 40(2), 41 and 42 of the Act. The Commissioner has investigated and finds that the Council correctly applied section 40(2) of the Act to the request. The Commissioner requires no steps to be taken.

### **The Commissioner's Role**

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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.

### **Background**

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2. The complainant requested an explanation of an entry contained within the Council's end-of-year accounts, which was labelled as "employment advice". The Council has confirmed that the only information held which explains the entry is the large volume of withheld information under consideration within this decision notice.
3. Due to the circumstances of this case, the level of background detail which the Commissioner can include in this notice is very limited. The Commissioner has therefore produced a confidential annex which sets

out further background detail. This annex will be provided to the Council but not, for obvious reasons, to the complainant.

## The Request

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4. On 29 April 2010, the complainant wrote to the Council and requested information in relation to a specific entry in the Council's end of year accounts. The complainant was seeking an explanation of an amount of expenditure labelled as "employment advice". Correspondence continued between the complainant and the Council in which the Council confirmed that the amount of expenditure in question was paid to a solicitor's firm, and subsequently stated that no further information could be provided as it was confidential.

5. On 18 May 2010 the complainant wrote to the Council as follows:

*[...] "You will be aware that I have been requesting information from your clerk about the above £6,663 payment, but explanations have been less than convincing, being such a large sum for "Employment Advise".*

*Seriously worrying is the fact that your clerk has sought to avoid providing detail under a general statement that the matter is 'confidential'.*

*This is unacceptable, as these monies belonged to the Taxpayers of Sturminster Newton, and any wastage or misuse of public funds that may have occurred is a serious matter.*

*[...]*

*The onus is upon you to provide documentary evidence to demonstrate that these funds have been properly spent. This would be acceptable with redactions so as to protect the privacy of any individual who may have been named in the 'employment advice'".*

6. The complainant made a formal request under the Act on 27 May 2010 as follows:

*"Copied below is an abstract from the Local Government Act 2000 Chapter 22 which states that your council can hold meetings in private but the records "must be made available to the public". As a member of the public I now formally request, under the Freedom of Information Act, those records".*

7. From the correspondence that precedes the request of 27 May 2010, it is clear that the complainant was requesting any information relating to the amount of expenditure in the end of year accounts identified above.
8. The Council responded on 22 June 2010 and stated that the information requested was exempt from disclosure by virtue of sections 40 and 41 of the Act.
9. The complainant wrote to the Council on 10 July 2010 to express his dissatisfaction with the Council's refusal to release the requested information. The complainant expanded further on his information request, as follows:

*"My reading and understanding of the Acts your clerk mentions is that you are misusing the word "confidential" which is defined as not disclosing confidential information that you have received which could result in an actionable breach of confidence.*

*I do not wish to know what information you have received in confidence nor the name of any individual, but how your finance committee and then full council approved the expenditure of £6663 of taxpayer money on "General employment advice" which now appears to be about a specific ex employee. Was an industrial tribunal held? Did the SNTC win? What was the accusation? Was it settled out of court? Was compensation paid or received and if so for what?*

*[...]*

*I do not want to know "confidential" information, but to see transparency in how the SNTC works. I again give you the opportunity to provide all the information concerning the expenditure of this money. Limited redaction of some information may be acceptable".*

10. The Council's solicitor responded to the complainant on 23 July 2010 and stated that the information in question did relate to a specific employee, and explained that it had entered into a legally binding agreement with the employee which placed legal obligations on the Council not to disclose any details into the public domain. The Council claimed reliance on sections 40, 41 and 42 of the Act in withholding the requested information.
11. On 15 September 2010 the complainant formally requested an internal review of the Council's refusal to disclose the requested information.
12. The Council provided the outcome of its internal review on 25 October 2010, upholding its decision to withhold the information requested by virtue of sections 40, 41 and 42 of the Act.

## The Investigation

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### Scope of the case

13. On 19 November 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly withheld the requested information.
14. Whilst the complainant has stated that he is not seeking access to information of a personal or confidential nature, the Council has identified a large volume of information which, in its entirety, explains the financial entry as requested by the complainant.
15. The complainant has already been informed that the information relates to a specific employee and that the Council had entered into a legally binding agreement with that employee. The complainant confirmed that he was seeking a more detailed explanation than this.
16. During the course of his investigation, the Commissioner identified that some documents were duplicated, some were already available in the public domain and some were not exempt from disclosure, in the Commissioner's preliminary view. As a result, the Council released 14 documents into the public domain on 15 April 2011. The outstanding withheld information, as agreed between the Commissioner and the Council, therefore consisted of 191 separate documents.

### Chronology

17. On 16 February 2011 the Commissioner wrote to the Council to request detailed arguments to support its decision to withhold the requested information by virtue of sections 40, 41 and 42 of the Act, and to request copies of the withheld information.
18. The Council responded on 8 March 2011 and provided further arguments to support its application of the exemptions at sections 40, 41 and 42 of the Act. The Council also provided the Commissioner with copies of the withheld information.
19. On 1 April 2011 the Commissioner wrote to the Council to further clarify the scope of the request. The Commissioner provided a full list of documents, and highlighted the documents that he considered were duplicates, non-exempt documents and documents falling outside the scope of the request.
20. The Council responded on 15 April 2011, confirming its agreement with the Commissioner's view on the scope of the request. The Council also

confirmed that it had provided the complainant with copies of the 14 documents which were agreed not to fall within the scope of the request.

## Analysis

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### Exemptions

21. The Commissioner, aware of his dual role as the regulator of the Data Protection Act 1998, began his investigation by identifying whether any of the withheld information was exempt from disclosure by virtue of section 40(2) of the Act.

### Section 40(2)

22. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 ('the DPA').
23. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this notice about the Council's submissions to support its position in respect of its application of this exemption and the Commissioner's consideration of those arguments is very limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to the application of the exemption. This annex will be provided to the Council but not, for obvious reasons, to the complainant.

### Is the information personal data?

24. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as:

*"...data which relate to a living individual who can be identified*

- *from those data, or*
- *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".*

25. Due to the circumstances of this case and the nature of the withheld information, most of the discussion on whether the information in question is personal data is contained within the confidential annex. In summary, the Commissioner considers that the withheld information consists of the personal data of various third parties as defined by the DPA. Having viewed the withheld information, the Commissioner is satisfied that the data, in its entirety, relates to living individuals who can be identified from those data and any other information already in the public domain.

### **The first data protection principle**

26. Having concluded that the information falls within the definition of “personal data” the Commissioner has gone on to consider if disclosure of the information would breach the requirements of the first data protection principle. The first data protection 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”*

### **Fairness**

27. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual 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 as well as any legitimate interests which arise from the specific circumstances of the case.

#### **a) Expectations of the individuals concerned**

28. A data subject’s expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example, privacy. It is accepted that every individual has the right to some degree of privacy and this right is so important that it is enshrined in Article 8 of the European Convention on Human Rights.
29. However, expectations are also shaped by a society where transparency and the Freedom of Information Act’s presumption in favour of disclosure of information form part of its culture. This was recognised by

the Tribunal in the case of *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016) where it was said that:

*"...The existence of the FOIA [Freedom of Information Act] in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money". (para 43)*

30. The Commissioner's Awareness Guidance on section 40 suggest that when considering what information third parties should expect to have disclosed about them, 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".*

31. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (ie their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (ie their public life).
32. Notwithstanding the fact that the information in question does relate to the individual's public life, based on the nature of the withheld information and the submissions provided to the Commissioner by the Council, the Commissioner is satisfied that the individual would have had a reasonable expectation that their information would be kept confidential and not passed onto third parties without their explicit consent.

## **b) Consequences of disclosure**

33. In assessing the consequences of disclosure the Commissioner has considered what those consequences might be and has then looked at other related factors. The Commissioner has taken into account that the data subjects' emotional wellbeing may be affected by disclosure even though the distress or damage caused may be difficult to quantify.
34. Having considered the nature of the information and the expectations as noted above, the Commissioner is satisfied that release of the information requested could potentially cause unnecessary and unjustified damage and/or distress to the individuals in this case.

### c) General principles of accountability and transparency

35. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure. This has been evidence in cases for example involving MPs expenses (such as EA/2006/0015 & 0016) where on appeal the High Court stated:

*"The expenditure of public money through the payment of MPs salaries and allowances is a matter of direct and reasonable interest to taxpayers".*

36. The Commissioner has identified that some legitimate public interest arguments could be considered to favour disclosure; including the transparency and accountability of public authorities, and the effective spending of public money. The Commissioner considers that the effective spending of public money weighs particularly heavily in this case, since the complainant is specifically seeking access to an explanation for an amount of expenditure contained in the Council's annual accounts.

37. The complainant provided the Commissioner with his arguments in favour of the withheld information being disclosed, suggesting that the Council's refusal to release the information raised suspicions about its intentions, and that its refusal to disclose any further information was to conceal a "misdeed" or "embarrassment". The complainant considered that the Council's labelling of the item in its accounts, as "employment advice" was misleading, as he had subsequently become aware that the expenditure related to a specific former employee. The complainant also considered that had the matter gone to a tribunal; the details would have been in the public domain in any case. The complainant also considered that confidentiality could be maintained by redacting names, but that "the financial accounts must remain accurately itemised and open to scrutiny".

38. Whilst the Council acknowledged the general public interest in the promotion of transparency, accountability and how public money is spent, it did not consider that disclosure in this specific case would meet that public interest for a number of reasons, some of which are contained in the confidential annex:

- The Council publishes on its website all Council minutes that are not confidential; including all financial information.
- The Council has referred in its published financial information to the money spent on obtaining employment advice so there is transparency in terms of the Council's spending.



- The key individuals involved, who the Council had time to contact regarding consent, had already objected to the disclosure.
  - The other data subjects identified by the information may also refuse to consent to the disclosure of their personal information.
  - It is reasonable for the individuals involved to expect that this information would not be disclosed to the public.
39. Given the nature of the withheld information, the Commissioner does not consider that the legitimate interests of the public in accessing this information are sufficient to outweigh the individuals' right to privacy. The Commissioner considers that the data subject had a reasonable expectation of privacy in relation to the withheld information and that to release this information would be unfair and likely to cause damage or distress to them. Further, the Commissioner considers that the Council has already fulfilled its responsibilities by explaining that the expenditure related to "employment advice", and publishing this information in its public minutes.
40. In conclusion, the Commissioner finds that disclosure of the information requested would be unfair and would therefore contravene the first data protection principle. The Commissioner upholds the Council's application of section 40(2).

### **Other exemptions**

41. Since the Commissioner has found that the exemption at section 40(2) of the Act is engaged in respect of the withheld information, he has not gone on to consider the Council's application of sections 41 or 42 to the withheld information.

### **The Decision**

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42. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act:
- It correctly relied upon section 40(2) of the Act in withholding the information.

### **Steps Required**

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43. The Commissioner requires no steps to be taken.

## Right of Appeal

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44. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

45. 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.
46. 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 14<sup>th</sup> day of June 2011**

**Signed .....**

**Andrew White  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### General Right of Access

#### 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).”

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.