

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 July 2011

Public Authority: Sandwell Homes Limited
Address: Dartmouth House
Sandwell Road
West Bromwich
B70 8TQ

Summary

The complainant made a request for copies of statements gathered as part of a disciplinary investigation into an allegation made about the conduct of one of the public authority's employees during a tendering process. The allegation was not made by the complainant. The public authority disclosed the requested details relating to the complainant's interview but refused to disclose the remainder using the exemption under section 40(2) (personal information) of the Freedom of Information Act 2000 (the 'Act'). During the course of the Commissioner's investigation the public authority made a further disclosure of three disciplinary policies. The Commissioner's decision in relation to the remaining information is that the exemption in section 40(2) is engaged and that disclosure would breach the Data Protection Act (the 'DPA').

He has decided that the public authority's handling of the request resulted in one or more procedural breaches of the Act, as explained in this Notice.

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.

Background

2. Sandwell Homes Limited is a public sector body, specifically an Arms Length Management Organisation (ALMO), whose responsibilities include the provision of housing management, repairs and maintenance to Council-owned properties throughout Sandwell.
3. The complainant is part of a company which was seeking to secure a contract in 2008 with Sandwell Homes. An allegation was made anonymously about alleged collusion by an employee of Sandwell Homes who was involved in the procurement process. The anonymous allegation provided details of another individual who was able to substantiate the allegation and who subsequently made a statement. The allegation potentially implicated the complainant's company and the group which owned the company, raising concerns about possible collusion between the company and the tender evaluation panel during the procurement process.
4. The allegation was subsequently investigated by Sandwell Homes. The employee concerned was suspended during the investigation and the complainant was interviewed as part of the investigation process. Sandwell Homes subsequently concluded that the *"situation was created through naivety of both my employees and yourself/ [company name redacted]."* Ultimately, the contract did not go ahead because of the complaint and for other reasons.

The Request

5. The complainant requested the following information from Sandwell Homes on 1 October 2010:

"Hi [employee's name redacted]

I hope you are well. In May 2008 [name redacted] from [company name redacted] and myself attended some interviews following an accusation from Sandwell Homes. Would it be possible to have any copies of interviews or statements in which our companies were involved, I would be happy to pay for any copying and I would be able to collect it off you if it helps..."

6. Although there was a delay in responding, Sandwell Homes replied on 2 November 2010, stating that it had instead considered the complainant's request under the Data Protection Act 1998. It provided the complainant with two documents which it explained were transcripts of his taped interview on 18 April 2008.

7. On 11 November 2010 the complainant emailed the relevant individuals from the Corporate Investigation Team and Sandwell Homes, querying why he had only received the transcript of his own interview and stating that he believed the legislation permitted him to view any information written about him. In addition, he commented that the transcript *"is not complete"*. The complainant specifically asked Sandwell Homes to provide *"copies of all documentation in [your] possession relating to Sandwell's internal investigation insofar as they relate to myself, [company names redacted]."* He asked for either the *"full documents relating to [my] request"*, or for an explanation of why the transcript was incomplete or alternatively for a full explanation of why the information would not be provided.
8. Sandwell Homes responded on 30 November 2010 outlining that it had carried out an internal review of the complainant's request. It confirmed that the transcript which it had provided to the complainant was the information it held on record of his interview of 18 April 2008. While it also confirmed that other third parties were interviewed at that time, it explained that it would not disclose this information because to do so would breach the provisions of the Data Protection Act 1998, and it therefore applied section 40(2) of the Freedom of Information Act. It further explained that it had held an internal disciplinary investigation concerning one of its employees, but that it was withholding details of the investigation and disclosure of the associated investigation report by virtue of section 40(2). Sandwell Homes outlined the elements it had considered in reaching its decision, referring to a previous Decision Notice (*reference FS50068239*) which contained the Commissioner's view that information which might be deemed 'HR information' should remain private.

The Investigation

Scope of the case

9. On 2 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant's letter to the Commissioner specified that his main concern was that he had not been provided *"with the initial complaint about ourselves which eventually led Sandwell Homes to cancel a contract with ourselves"*.

Chronology

10. On 8 February 2011 Sandwell Homes wrote to the Commissioner explaining why it had applied section 40(2) to some of the requested

- information and also provided the Commissioner with a copy of the withheld information.
11. Having reviewed the withheld information, the Commissioner wrote to the complainant on 3 May 2011 outlining his preliminary view that Sandwell Homes had correctly withheld some of the requested information in accordance with the exemption in section 40(2) of the Act.
 12. However, whilst not specifically requested by the complainant in his request, the Commissioner decided that Sandwell Homes' Disciplinary Rules, Disciplinary Procedures and Code of Conduct policies utilised during the disciplinary investigation, and included as part of the withheld information forwarded to the Commissioner, should be disclosed to the complainant.
 13. The Commissioner invited the complainant to withdraw his complaint on the basis of his preliminary view; however, the complainant responded on 5 May 2011 raising a number of queries with the Commissioner.
 14. On 9 May 2011 the Commissioner sought clarification from Sandwell Homes about the complainant's queries, together with some further questions of his own.
 15. The Commissioner requested electronic copies of the aforementioned policies from Sandwell Homes which he forwarded to the complainant on 26 May 2011. Having reviewed Sandwell Homes' response sent on 7 June 2011, that same day the Commissioner wrote to the complainant with the additional clarification stating that his initial view had not changed in light of this, and asking the complainant to confirm whether he would now withdraw his complaint.
 16. On 21 June 2011 the complainant declined to withdraw his complaint.

Analysis

Exemptions

Section 40 – personal information

17. The full wording of the sections detailed in this Notice can be found in the Legal Annex.
18. Section 40(2) provides an exemption for information which is the personal data of any third party and where either of the conditions set out in section 40(3) is met.

19. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA.
20. In analysing the application of section 40(2), the Commissioner therefore considered (a) whether the information in question in this case was personal data, and (b) whether disclosure of the personal data would contravene the first data protection principle.

Is the information personal data?

21. Personal data is defined in section 1 of DPA as data:

“which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

22. Having reviewed the withheld information, namely the disciplinary investigation report and allegations, the Commissioner is satisfied that, with the exception of the Disciplinary Rules, Disciplinary Procedures and Code of Conduct policies, the information falls within the description of personal data as defined by the DPA. The Commissioner notes that Sandwell Homes offered to make these policies available to the complainant in its letter to the Commissioner of 8 February 2011 because it considered they did not fall within the remit of the DPA. Subsequently, these documents were provided to the complainant during the Commissioner’s investigation.
23. Having established that the remainder of the withheld information is personal data, the Commissioner is satisfied that section 40 of the Act is engaged. It is therefore necessary to decide whether the information is exempt from disclosure under any of the conditions described in section 40(3). The first condition applicable is that described in section 40(3)(a)(i), namely that disclosure will breach any of the data protection principles.

Would disclosure contravene the first data protection principle?

24. Sandwell Homes has argued that the withheld information is exempt under section 40(2) because disclosure would breach the first data protection principle.
25. The first data protection principle has two main components. They are as follows:
- the requirement to process all personal data fairly and lawfully; and
 - the requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data.
26. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data protection principle.
27. It is important to note that any disclosure under this Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it.
28. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* [EA/2006/0011 and EA/2006/0013] (following *Hogan and Oxford City Council v The Information Commissioner* [EA/2005/0026 and EA/2005/0030]) confirmed that: "*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*" (paragraph 52)¹.
29. At the internal review stage, Sandwell Homes advised the complainant that:
- "this investigation report contains considerable amounts of personal data relating to certain employees and references to other individuals but in this case it would not be possible to extract this information in a meaningful manner, without providing personal data that could identify both the employee and the allegations."*
30. Although his original request was for copies of interview statements taken as part of Sandwell Homes' disciplinary investigation, the

¹

http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf

complainant has advised the Commissioner that he specifically wished to know details of the allegations made about him/his company which ultimately resulted in Sandwell Homes terminating its contract with the complainant's company. The Commissioner has borne this in mind when considering whether any of the withheld information should have been disclosed to the complainant.

Fairness

31. 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 individuals concerned, the nature of those expectations and the consequences of disclosure to those individuals. He has then balanced against these the general principles of accountability and transparency, as well as any legitimate interests which arise from the specific circumstances of the case.

Expectations of the individuals concerned

32. 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. However, expectations are also shaped by a commitment to transparency in the way public authorities conduct their activities, and the Act's presumption in favour of disclosure. This was recognised by the Tribunal in *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* [EA/2006/0015 & 0016], which commented that:

"The existence of FOIA 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. This is a factor that can properly be taken into account in assessing the fairness of disclosure" (para 43).

33. The Commissioner considers that although there are no absolute rules, where information relates to an individual's private life (i.e. home, family, social or financial), it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). The Commissioner believes that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. However, as set out in his

guidance on section 40, 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.

34. The Commissioner believes that the information relevant to this case could be argued to fall into the category of HR information because it relates to disciplinary investigations and actions and is a personnel matter, and his general view is that this type of information should remain private. The Commissioner is satisfied that the individual subject to the disciplinary investigation and those who were interviewed as part of the investigation, would have had a reasonable expectation that the details they provided during the course of the disciplinary investigation would be kept confidential and not passed on to third parties without their consent.

Consequences of disclosure

35. In light of the nature of the information and the reasonable expectations of the individuals concerned, as noted above the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individuals in this case.

General principles of accountability and transparency

36. Notwithstanding a 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.
37. The Commissioner notes that in the complainant's opinion, disclosure of the requested information would be in the public interest because: *"in these times of economic uncertainties I believe that local authorities should be completely transparent in their actions, this obviously isn't the case with Sandwell Homes"*. The complainant also stated: *"It appears that Sandwell Homes have accused my company of wrong doing, cleared me and then used the accusations made by our competitors to cancel a contract"*. He also advised the Commissioner that one of the companies making the accusations is now contracted by Sandwell Homes, fulfilling the works awarded to the complainant's company.
38. The complainant also stated that he considered it *"odd"* that the employee subject to the disciplinary investigation had been provided with all the information, including copies of the allegations, whereas they were withheld from the complainant. The Commissioner asked

Sandwell Homes to confirm whether his assumption that this was its procedure for investigating disciplinary issues was correct. Sandwell Homes confirmed that, once the decision has been made to hold a disciplinary hearing, it is usual for all the evidence gathered during the investigation (the 'report') to be provided to the accused employee due to attend the hearing.

39. The Commissioner believes that the public's interests must be weighed against any prejudice to the rights, freedoms and legitimate interests of the individuals concerned. The Commissioner accepts Sandwell Homes' contention that these individuals would have a strong expectation of privacy and confidentiality over the details of the disciplinary investigation. The Commissioner is mindful that there is no suggestion any of the individuals involved in the disciplinary investigation have placed any information about the investigation into the public domain.
40. The Commissioner's conclusion is that disclosure of the requested information would enable private information to be deduced about individuals by others who possessed 'corroborating information'. The Commissioner finds that the individuals involved in the investigation, together with the individual subject to it, would have a reasonable expectation that the information related to disciplinary proceedings would remain confidential, and he therefore concludes that the disclosure of the requested information would be unfair and a breach of the first data protection principle. It has therefore not been necessary to go on to consider any of the conditions in Schedule 2 of the Data Protection Act 1998.
41. With the exception of the Disciplinary Rules, Disciplinary Procedures and Code of Conduct policies, the Commissioner upholds Sandwell Homes' application of the exemption provided by section 40(2) of the Act to the remainder of the withheld information.

Procedural Requirements

42. Section 10(1) states 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."

43. The Commissioner has considered whether Sandwell Homes has complied with its obligations under section 17(1). This requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.
44. The full texts of sections 10 and 17 can be found in the Legal Annex at the end of this Notice.

The Decision

45. 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 applied the exemption contained within section 40(2) to the withheld information.
46. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- in failing to issue a refusal notice within 20 working days, the public authority breached section 17(1);
 - in failing to confirm or deny whether it held the requested information within 20 working days, it breached section 10(1).

Steps Required

47. Given that copies of the Disciplinary Rules, Disciplinary Procedures and Code of Conduct were disclosed to the complainant during the Commissioner's investigation, he requires no steps to be taken.

Right of Appeal

48. 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

49. 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.
50. 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 25th day of July 2011

Signed

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

Legal Annex

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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner."

Section 10(6) provides that –

"In this section –

"the date of receipt" means –

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

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 -

(c) states that fact,

(d) specifies the exemption in question, and

(e) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

(f) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

1. 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

2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and

- (g) 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."

Section 17(3) provides that -

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

- (h) 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
- (i) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"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.

Section 17(5) provides that –

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

Section 17(6) provides that –

"Subsection (5) does not apply where –

- (j) the public authority is relying on a claim that section 14 applies,
- (k) 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

- (l) 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."

Section 17(7) provides that –

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

- (m) 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

(n) contain particulars of the right conferred by section 50."

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-

- (o) it constitutes personal data which do not fall within subsection (1), and
- (p) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (q) 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-

3. any of the data protection principles, or
4. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

- (r) 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-

- (s) 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

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

1. 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

2. 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."