

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 4 October 2006

Public Authority: Gateshead Council
Address: Civic Centre
Regent Street
Gateshead
NE8 1HH

Summary Decision

1. The complainant asked the public authority ('the Council') for information which it held about the British National Party ('the BNP') and the Tyne and Wear Anti - Fascist Association ('TWAFA'). In its response the Council said that it held no information about the BNP. It made available to the complainant all information held on TWAFA but redacted the names and contact details of individuals and groups, citing the exemption contained in section 38 of the Freedom of Information Act 2000 ('the Act'). The Council also withheld three documents because it considered that the information contained within them was exempt by virtue of section 42 of the Act. However, having reviewed the position, the Council later provided to the complainant two of those documents. The Commissioner has decided that sections 38 and 42 are engaged in this case and that the public interest lies in favour of maintaining those exemptions. He has also decided that section 40 is engaged in respect of certain personal information. Therefore, the Commissioner does not require the Council to take any further action.

The Commissioner's Role

2. The Commissioner's role 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 .This Notice sets out his decision.

The Request

3. On 17 January 2005 the complainant wrote to the Council requesting:

“All information and Council documents concerning the BNP.

All correspondence between your Council and the Home Office, Office of the Deputy Prime Minister and any other Government Departments relating to the BNP.

All information concerning Council policy, protocols and procedures when dealing with the BNP, including BNP members who work for the Council.

All information, financial records and Council internal documents relating to the Tyne and Wear Anti - Fascist Association.”

4. The Council replied on 15 February 2005 stating that it held no information in relation to the BNP with the exception of two letters from the BNP about TWAFa, which the complainant had seen. The Council agreed to provide access to all of the records requested by the complainant about TWAFa, but redacted the names and contact details of TWAFa employees, junior Council staff, organisations with which TWAFa liaised and locations of particular meetings or forums attended. In withholding that information the Council cited the exemption in section 38 of the Act (information which would or would be likely to endanger the physical or mental health of an individual, or endanger the safety of an individual, if disclosed). The Council also withheld three documents containing information to which it applied the exemption in section 42 of the Act (legal professional privilege). The Council considered that, in the case of both exemptions, the public interest in maintaining the exemptions outweighed the public interest in disclosure. In addition, the Council applied the exemption in section 21 of the Act to TWAFa's newsletters as these were accessible on their website.
5. On 16 February 2005 the complainant asked for a review of his request. The Council responded on 25 February, upholding the original decision to redact certain information by virtue of section 38 of the Act. The Council stated that it considered that the redactions did not affect the transparency of the process by which it dealt with organisations such as TWAFa; and that the substance of its dealings with it was still apparent from the redacted documents. However, the Council decided that legal professional privilege did not in fact apply to the information contained within two of the three documents withheld and therefore provided the complainant with copies of these. The Council also provided copies of TWAFa annual reports not available on its website (there had been a misunderstanding of the term 'newsletter' which had actually referred to annual reports).
6. The Council also explained that the inconsistency in redactions was due to human error. It stated that the withholding of the identification of people and places should have been consistent throughout the process and that where such information was not redacted, it was because it had been overlooked, and that, in fact, it should not have been disclosed.

The Investigation

Scope of the case

7. On 2 March 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant said that he did not believe that an organisation supported by public funds should be protected by the section 38 exemption, and that by withholding information about TWAFAs the Council had failed to demonstrate transparency in the grant process. He also considered that the Council had been inconsistent in its application of the section 38 exemption in that it had been applied to some documents but not to others.
8. The Commissioner understood the basis of the complaint to be that the Council had failed to provide all the relevant information that it held about TWAFAs in response to the request. The Commissioner's investigation involved assessing whether the Council had correctly applied the exemptions in sections 38 and 42 of the Act to the information requested. Details of these exemptions – together with the exemption in section 40, which the Commissioner considers to be relevant - are set out in the Legal Annex to this Decision Notice.

Chronology of the case

9. After an initial acknowledgement, the Commissioner wrote to the Council seeking copies of the information in question together with the Council's comments on its reliance on the section 38 and section 42 exemptions in redacting certain information. Copies of all relevant internal and external papers and correspondence were also provided by the Council. The bulk of the documents related to TWAFAs's applications for grants, and information about its activities.
10. The Council stated that, when the complainant's request for information was received, it held a meeting with TWAFAs which expressed grave concerns about the names and contact details of TWAFAs officers and community groups with which it had worked being released. This was because, when this type of information had become publicly known in the past, it had led to TWAFAs and community groups being targeted for harassment. Therefore, although all of the documents requested by the complainant had been provided to him, information about TWAFAs officials and the names and details of organisations and individuals with whom it worked had been redacted by virtue of section 38 of the Act. The Council also withheld three documents to which it considered that the section 42 exemption applied as the information comprised advice by the Strategic Director, Legal and Corporate Services, and a copy of a letter from TWAFAs's solicitors.
11. The Council said that, before finalising their decision, the matter had been considered by an internal independent review panel. The panel decided that the section 38 exemption applied to the information proposed for redaction, and that the three legal documents were exempt under section 42. The panel considered

that, in both cases, the public interest in maintaining the exemptions outweighed the public interest in disclosure.

12. Following the complainant's request for a review, the Council decided that the section 38 exemption had been applied correctly to the redacted information, but that two of the three documents which had been withheld should be released to the complainant. However, it was decided that the section 42 exemption had been cited correctly in the case of the third document, which related to legal advice provided by the Head of Litigation to the Chief Executive's Department.
13. During the course of the investigation the Commissioner was contacted by TWAFa which reinforced the organisation's concerns about the request for information. TWAFa explained that it was a voluntary body involved in campaigning against extremist organisations, and also in political work such as anti-racist education and tackling hate crime. TWAFa provided evidence of harassment and intimidation and stated that it was fearful of the potential threat to its staff and contacts should their details be released. TWAFa also explained that it no longer published its office address as it had suffered harassment at its previous address. In addition, it had been targeted at the venues of other organisations when meetings with them had been held.

Analysis

14. The Commissioner has considered carefully the complainant's representations and the public authority's response to the complainant's request for information. The exemptions cited by the Council in refusing to release the requested information are set out in the Legal Annex.

Section 38

15. Section 38 provides an exemption in relation to information which, if disclosed, would, or would be likely to, endanger the health or safety of an individual. The Council has cited this exemption because it considers that individuals and organisations could be at risk of harassment by the release of their names and contact details. While this exemption can be applied to the details of organisations associated with TWAFa, and to TWAFa's address, the Commissioner considers that the disclosure of information relating to living individuals is more appropriately dealt with under section 40 of the Act (see paragraph 22 below).
16. The Council held a meeting with TWAFa before reaching its decision to redact names and contact details from the information provided to the complainant, and was clearly influenced by TWAFa's serious concerns about possible harassment. This was based on previous experience when the release of such details had resulted in the singling out of individuals and organisations for harassment: TWAFa has provided evidence that its members have been subjected to physical and verbal abuse in the past.

17. While there can be no certainty that the release of the redacted information would put the individuals and organisations concerned at risk, there is sufficient evidence to lead the Commissioner to conclude that there is a real possibility of them being targeted for harassment and possible violence by others. The Commissioner is therefore satisfied that the section 38 exemption is engaged in relation to the organisations whose details were redacted from the papers released to the complainant, as the release of that information could endanger the health and safety of those involved with the organisations. However, as mentioned above, the Commissioner considers that section 40 is the exemption which should be applied to information about the individuals specifically named in the documents.
18. The fact that there were some inconsistencies in the redaction of information provided to the complainant does not suggest that the section 38 exemption does not apply to any of the information. The Commissioner accepts the Council's assertion that this inconsistency was due to human error. Had the information been properly redacted, less information – all that which is subject to an exemption – would have been withheld.

Public Interest Test

19. Section 38 is a qualified exemption and the public interest test therefore needs to be considered. The complainant argues that there is no good reason why a group granted public funds should be exempt from the provisions of the Act and that there should be transparency in relation to such funding arrangements. The Council believes that, in view of the concern about the safety of individuals and groups named in the documents, the public interest in maintaining the exemption outweighs the public interest in disclosure. The Council has also said that it does not believe that the redactions have resulted in any less transparency in its dealings with TWAFa.
20. The Commissioner recognises that there is a considerable public interest in the way that councils allocate funds to voluntary organisations such as TWAFa. However, the information disclosed to the complainant represents a complete picture of the Council's dealings with TWAFa including the amount of funds allocated to it, and the activities entered into by it.
21. The Commissioner considers that the public interest in transparency and openness relating to the allocation of grants to TWAFa has, in principle, been met by the disclosure of the documents already made; disclosure of the names and contact details of those bodies included in the documents would not add to the public understanding of the Council's activities in that regard. Therefore the Commissioner does not believe, given the real risk to the health and safety of the staff of the organisations whose details have been redacted, that the public interest would be served by disclosure of those details. The Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 40

22. The principal function of section 40 is to protect personal data relating to living individuals rather than organisations. The names and contact details of individuals which appear in the documents requested by the complainant clearly constitute personal data as they relate to personal information about third parties. The Commissioner has therefore considered the applicability of section 40 rather than section 38 to this information. The information will constitute exempt information if one of two conditions referred to in section 40(2) are satisfied. In considering the first condition the Commissioner has had regard to whether any of the data protection principles would be breached by releasing the information. The first data protection principle requires that personal data should be processed fairly and lawfully and in particular should not be processed unless at least one of the conditions in schedule 2 of the Data Protection Act 1998 is met.
23. The information in question comprises the names and contact details of TWAFAs officials and junior Council staff. Both TWAFAs and the Council have expressed their concerns about the information being released, and in the meeting between them it was agreed that it was neither necessary nor appropriate to disclose the names and contact details of the staff. The Commissioner accepts that disclosure could cause distress to the staff concerned and that they have a legitimate expectation that their details should not be placed in the public domain. Having concluded that none of the conditions in Schedule 2 of the 1998 Act are met, and having taken into account the concerns of the Council and TWAFAs, the Commissioner has decided that the processing would not be fair; and that the information should therefore remain withheld.
24. Section 40 provides an absolute exemption where disclosure of personal data about someone other than the complainant would contravene any of the data protection principles. The exemption is not, therefore, subject to the public interest test.

Section 42

25. The only complete document withheld by the Council is a minute from the Head of Litigation to the Chief Executive's Office. The minute includes advice on the legal position in relation to grants made available to TWAFAs and the use to which they are put. The Council has applied section 42 to the information contained in the minute as it believes that it attracts legal professional privilege. Having reviewed the minute in question, and established that its principle purpose was the provision of advice by a professional legal adviser the Commissioner is satisfied that the information clearly falls within the exemption set out in section 42.

Public Interest Test

26. As section 42 is a qualified exemption it is however necessary to consider the public interest arguments for and against maintaining the exemption. The complainant's arguments as to why the information should be disclosed are set out in paragraph 19 above. In essence, he believes that public bodies should be

accountable for their actions in allocating public money to voluntary organisations. However, while the Commissioner acknowledges this, he also believes that there is a strong generic public interest in maintaining the section 42 exemption. The concept of legal professional privilege has developed to ensure that clients are able to communicate with their legal advisers in confidence. This is a central concept in the legal system and there is a strong public interest in protecting that confidentiality. In a recent Information Tribunal decision relating to the exemption (EA/2005/0023) it was stated that "There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest". Therefore, there would need to be a compelling argument in favour of disclosure in order to override that inbuilt public interest, and the Commissioner does not consider that argument to be sufficient in this case.

The Decision

27. The Commissioner's decision is that the public authority has dealt with the request for information in accordance with the requirements of the Act.

Steps Required

28. The Commissioner requires no steps to be taken.

Right of Appeal

29. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Reference: FS50066289



Dated the 4th day of October 2006

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Materials Annex

Relevant sections of the Freedom of Information Act 2000

Section 1(1) states 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.

Section 2(2) states that:

In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 38 states that:

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to –
 - (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual.

Section 40 states that:

- (1) Any information to which a request for information relates is exempt information if it is 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.

Section 42 states that:

- (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.