

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 June 2007

Public Authority: Nottinghamshire County Council
Address: County Hall
West Bridgford
Nottingham
NG2 7QP

Summary

The complainant requested details of expense claims made by a Councillor, these included claims made for telephone calls and the complainant required the numbers called. The public authority provided information but redacted the telephone numbers called on the basis that the exemption at section 40(2) of the Act applied, the numbers are personal data and to disclose them would breach the first data protection principle. The Commissioner agrees that the exemption has been applied correctly although the public authority breached section 17(1) of the Act as the Refusal Notice provided was not fully compliant.

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. In a letter of 10 February 2005 the complainant requested the following information from the public authority:

"In accordance with the Freedom of Information Act 2000, please supply me with copies of all expense claims of Councillor Bromfield since April 1 2004, and any attached or associated bills (including mobile telephone bills), invoices, memoranda or receipts recorded on paper or computer."

Please also supply me with full details and any associated bills, invoices, tickets, memoranda or receipts relating to all home and foreign visits Councillor Bromfield has been on since April 1 2004.”

3. The public authority responded to the request by two letters sent by fax, both on 11 March 2005. Some information was provided and the exemption at section 31(1)(g), as the terms of 31(2)(b) were satisfied, was cited in relation to some of the information. As the public interest test needed to be considered, the public authority informed the complainant that it may need until 18 March 2005 to be able to respond further.
4. The public authority wrote again to the complainant on 14 March 2005 and provided further information and details of the public interest test considerations in accordance with section 31 as previously applied.
5. The complainant wrote to the public authority on 16 March 2005 asking that it give further explanation of the application of section 31 and the prejudice that it felt was likely. The public authority responded to this by letter of 18 March 2005.
6. The complainant sent a fax to the public authority on 23 March 2005 asking that it clarify the situation regarding the telephone numbers dialled – he asked whether the information was being withheld or whether the public authority did not hold it.
7. The public authority responded to the complainant's fax on the same day. The response also answered some queries that the complainant had raised in a telephone conversation. In response to the question about the telephone numbers dialled by the Councillor, the public authority stated that they were being withheld in accordance with its duties under the Data Protection Act 1998. No exemption under the Act was cited and no further detail given.
8. In a letter of 1 April 2005, the complainant complained about the response to his request. The complaint focussed particularly on the telephone numbers being withheld.
9. The review of the decision was conducted by the public authority and the outcome communicated to the complainant in a letter of 28 April 2005. It was stated that the section 40 exemption applies although no subsection was cited. This letter referred the complainant to the Information Commissioner if he was not satisfied with the decision.

The Investigation

Scope of the case

10. On 3 May 2005 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 that the public interest would be

served by release of the telephone numbers for the complainant's investigation as this would allow scrutiny of the expenditure of public money.

11. During later correspondence with the complainant, the Commissioner established that he wished the investigation and subsequent Decision Notice to focus upon the withholding of the telephone numbers only, not the other information which had not been disclosed.
12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

13. The Commissioner wrote to the public authority on 8 September 2006. He asked the public authority to explain why certain of the information requested had not been provided.
14. The Commissioner stated in this initial letter that his preliminary view was that the redaction of the telephone numbers dialled was appropriate.
15. The public authority responded by letter of 18 September 2006 providing explanations as required and a sample of the exempt information as requested by the Commissioner.
16. The Commissioner wrote to the complainant by fax of 16 November 2006 to ascertain whether a decision from him was required to address all of the requested information or simply to adjudicate upon whether the telephone numbers should be provided.
17. The complainant confirmed in a telephone conversation of the same day following that fax that a Decision Notice need only focus upon whether the telephone numbers should be provided.
18. The Commissioner sought clarification of the public authority's application of section 40 in a letter of 13 April 2007. This letter specifically requested the subsection of section 40 that was being relied upon; an explanation as to why the exemption applies and details of any public interest factors or breach of data protection principle that was considered.
19. In its initial response of 18 April 2007, the public authority provided extracts from the notes of the panel that made the original decision not to disclose the information requested. This made mention of a European Court of Justice case, the outcome of which indicated that telephone numbers are personal data. It further included a statement that "the public interest is served by preserving the integrity of the investigatory process and outweighs the public interest in disclosure."
20. There was no further detail such as the subsection of section 40 that was being relied upon or any mention of the data protection principles within the letter. The Commissioner therefore wrote to the public authority again on 24 April 2007

giving specific points to be addressed by the public authority in order to obtain the level of detail of the reasoning behind the decision not to disclose that he required to assist in making his Decision.

21. The public authority responded by letter of 14 May 2007. This letter cited subsection (2) of the section 40 exemption but did not make mention of the data protection principles or section 10 of the Data Protection Act that it felt would be breached by disclosure. It did provide details of the European Court of Justice case referred to earlier: "The ruling in Case C-101/01 Criminal Proceedings against Bodil Lindqvist ("ECJ Case C-101/01")²"
22. Rather than return to the public authority again, the Commissioner made his Decision based upon the information that had been submitted and internal advice that he received.

Analysis

Procedural matters

23. As this Decision Notice relates solely to the application of an exemption to the telephone numbers requested, the Commissioner will not consider the application of other exemptions or the other information that was requested.
24. Under the terms of section 17(1), a public authority must state that an exemption applies; cite the exemption and explain why it applies if it is not obvious. See attached Legal Annex for the full text of section 17.
25. As referred to above, this Notice deals solely with the request for the telephone numbers made by the complainant. The public authority failed to cite the full exemption when withholding this specific information. There was no mention of the non-disclosure of the telephone numbers in particular in the original Refusal Notice. It was only after the complainant asked for clarification regarding the telephone numbers that the public authority stated that they were being withheld in accordance with its responsibilities under the Data Protection Act 1998 although section 40 of the Act was not cited at this stage. In fact, section 40 was not cited until the communication of the outcome of the internal review of 28 April 2006 to the complainant.
26. The public authority did not cite the subsection of section 40 that applied within any correspondence with the complainant and did not demonstrate any consideration of public interest factors or data protection principles where appropriate.
27. The public authority confirmed that section 40(2) of the Act was being relied upon in response to the Commissioner's request of 13 April 2007 for the required details. Although the public authority cited the subsection in its response to the Commissioner dated 14 May 2007, it did not specify which data protection

principle would be breached if this information were disclosed or state that it would breach section 10 of the Data Protection Act.

Exemption – Section 40(2)

28. Section 40(2) relates to personal data of third parties. In order for this exemption to apply, in the case of information that falls within any of paragraphs (a) to (d) of the definition of data within the Data Protection Act, the public authority must show that to release the information would contravene either:

- any of the data protection principles, or
- section 10 of the Data Protection Act.

The full text of section 40 of the Act is detailed within the Legal Annex along with the Data Protection Principles.

29. In this case, it does not appear that section 10 of the Data Protection Act would be contravened and the most relevant of the principles is the first principle which provides that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- a) at least one of the conditions in Schedule 2 is met, and
- b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

30. The Commissioner is of the view that telephone numbers are personal data within the meaning of the Data Protection Act both of the person who made the telephone calls and the individuals whose telephone numbers are contained in it.

31. Although the part of the request refused is just for the telephone numbers, the Commissioner is satisfied that these could easily be used to identify individuals, simply by calling those numbers. Indeed, the complainant has indicated that this would be the intention if the information was disclosed. This information would therefore constitute a disclosure of personal data, as the complainant in this case would be able to deduce who a particular individual was.

32. Disclosure without consent would, in the Commissioner's view, represent a clear unfairness to those individuals whose telephone numbers would be released. The Councillor may have been in touch with a constituent regarding a sensitive personal problem, for example. When reaching a view about whether disclosing information would breach the first data protection principle, the Commissioner considers one of the key factors to consider is what the expectations of the data subject are and whether these are reasonable. It is likely, in the Commissioner's opinion, that the individuals would not expect that their telephone numbers would be disclosed to the public in this way.

33. The telephone numbers called could also reveal personal information about the individual making those calls. Again, it is unlikely that he would have any expectation that this information would be released to the public. In considering

the legitimate interests of the public weighed against those of the data subject, the Commissioner recognises the argument that releasing the telephone numbers would provide the public with more detail about the way in which the Councillor was using resources paid for out of the public purse. However there are legal processes for audit and disclosure of expenditure incurred by councillors and procedures for the investigation of any allegation of inappropriate or excessive claims. Indeed, in this case the Councillor was already under investigation by both the public authority's internal audit team and the Standards Board, who are charged with investigating and dealing with any allegations of misconduct by elected local authority members on behalf of the public. In terms of the balance of interests to be considered when assessing the fairness of a potential disclosure of personal information; the legitimate interest of the public was already served by the work being carried out by these public bodies. In these circumstances it would therefore also be unfair to the Councillor to release the details of the telephone numbers he allegedly called at public expense.

34. When considering whether releasing information would breach the first data protection principle it is necessary to consider whether disclosure would be fair and lawful. Further, the first data protection principle states that information should not be processed unless one of the conditions in schedule 2 or 3 of the DPA is met. The Commissioner would point out that in some circumstances it will be possible to demonstrate that one of the conditions can be met but it would still be unfair to process the personal data. However, in this instance, as the Commissioner has determined that to release the information would be unfair he has not gone on specifically to consider whether or not any of the conditions in either schedule 2 or 3 of the Data Protection Act are met.

The Decision

35. 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:

The application of section 40(2) to the telephone numbers requested.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

Section 17(1) of the Act was not complied with as the Refusal Notice failed to cite the section 40(2) exemption and therefore to explain why it applies.

Once the section 40(2) exemption had been cited, it also failed to provide an explanation as to why it applied with reference to the data protection principles or section 10 of the Data Protection Act.

Steps Required

36. The Commissioner requires no steps to be taken.

Other matters

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

In not citing the section 40 exemption at the time of the refusal notice; then not providing the subsection of section 40 within the internal review nor when initially asked to by the Commissioner in his letter of 13 April 2007 and then not providing details of the data protection principle that would be breached, the public authority has shown a lack of understanding, certainly of section 40, of the Act.

The Commissioner hopes that the public authority will urgently address the issues that are clearly present with regard to freedom of information request handling.

Right of Appeal

38. 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.

Dated the 12th day of June 2007

Signed

**Graham Smith
Deputy Commissioner**

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