

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 April 2010

Public Authority: Hampshire Probation Board
Address: Friary House
Middle Brook Street
Winchester
Hampshire
SO23 8DQ

Summary

The complainant requested from Hampshire Probation Board (HPB) the age, grade and pay scale of an individual who was granted early retirement. Hampshire Probation Area (HPA) responded on behalf of HPB and stated that the information requested was the personal data of the individual concerned and was exempt from disclosure under section 40(2) of the Freedom of Information Act 2000 (the Act). The Commissioner finds that the information requested is the personal data of the individual concerned as it is sufficient to identify them when considered with other information in the public domain. Furthermore, the Commissioner finds that disclosure of this information would be unfair under the Data Protection Act 1998 (the DPA) and it is therefore exempt under section 40(2) of the Act.

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. On 13 October 2008 the complainant requested the following:

"The number of individuals, not of retirement age, who i.e. less than 65 years of age or in accordance with the 85 year Rule, less than 60 years of age, who were granted Early Retirement by Hampshire Probation Area between the dates of 1st August 2007 and 1st August 2008.

In respect of the above request please do not include in the figures any individual who was granted Early Retirement on the grounds of health or disability".

3. HPA responded on 24 October 2008 by stating the number of individuals was 'one' and this person was not subject to the 85 year Rule.

The Request

4. On 19 November 2008 the complainant made a further request for the following:

"In respect of the individual who was granted early retirement by Hampshire Probation Area between 1 August 2007 and 1 August 2008, I would specifically request:

1. *The age of the individual*
2. *The Grade and pay Scale of the individual."*

5. HPA responded on 16 December 2008 stating that personal information was exempt under section 40 of the Act and to disclose it would identify the individual member of staff.
6. On 9 March 2009 the complainant apologised for the delay (owing to pressures of work, problems with assistive technology and the time taken to seek specialist advice) and requested an internal review.
7. HPA responded on 14 May 2009 stating that it had taken advice from the Information Commissioner's Office (ICO) and reiterated that the disclosure of personal information about an individual was exempt under section 40 of the Act. The response was sent by the same individual who dealt with the original request on 16 December 2008.
8. On 18 May 2009 the complaint raised some additional questions as to the advice given by the ICO, why the matter was not referred to the Open Government Unit and why the National Probation Service

Hampshire complaints procedure was being introduced into a Freedom of Information Act enquiry.

9. On the 20 May 2009 HPA provided answers to the above questions (through the same individual who dealt with the earlier requests). It said that the advice from the ICO was via the telephone (as a result no recorded information was held), HPA no longer referred freedom of information requests to the Open Government Unit (as such requests were dealt with locally) and the National Probation Service Guidance required that the Area's internal complaints procedure had to be exhausted before a referral could be made to the ICO.
10. On 2 June 2009 the complainant said that she wished to make a formal complaint and understood that the usual complaints procedure for this was via a grievance for which she attached an appropriate form.
11. On 11 June 2009 HPA responded to the complainant and said that it was unable to uphold her grievance on the basis that personal information was exempt from disclosure under section 40 of the Act. It said that HPA has already set a precedent for similar information surrounding salary scales for director level staff when it did not disclose the information. It added that while the Chief Officer grade fell into the senior staff level as outlined in the ICO's Guidance, director level and below did not.
12. On 2 July 2009 the complainant appealed against HPA's refusal to provide her with the requested information.
13. On 20 August 2009 HPA wrote to the complainant with the outcome of its internal review of its decision not to disclose the requested information. It pointed out that the information requested together with other information it held would be sufficient to identify the individual concerned and therefore constitute their personal data. Accordingly as processing of this data would be unfair under the Data Protection Act 1998 (the DPA) it concluded that the information was exempt under section 40(2) of the Act.

The Investigation

Scope of the case

14. On 22 October 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider whether disclosure

of the information requested on 19 November 2008 could be made under 'the Public Interest criteria'.

Chronology

15. On 19 November and 16 December 2009 the Commissioner wrote to HPA and requested the withheld information. This was provided on 21 December 2009.
16. On 24 December 2009 the Commissioner requested clarification of a number of issues from HPA which was provided on 25 February 2010. In its response HPA reiterated why it believed the requested information was exempt under section 40(2) of the Act.
17. On 26 March 2010 the Commissioner requested a copy of the HPB's policy document governing discretionary pensions and early retirements. This was provided on 30 March 2010. Section 2 specifically deals with the 'early payment of benefits' under Regulation 31 of the [Local Government Pension Scheme Regulations 2007 \(as amended\) \(LGPSR\)](#). Retirement before the age of 60 requires the employer's consent and may result in the employer paying a special charge to the pension fund.
18. On 30 March 2010 the HPA confirmed that it had handled the complainant's request on behalf of the HPB.

Analysis

Exemptions

Section 40(2) of the Act

19. Section 40(2) provides an exemption to the duty to disclose information where the information requested constitutes the personal data of a third party, (subject to the provisions of the Data Protection Act 1998).
20. Section 1(1) of the DPA defines personal data 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 indication of the intentions of the data controller or any other person in respect of the individual...'

21. When considering disclosure or non-disclosure of third-party personal information, an authority is required to consider the data protection principles as set out in Schedule 1 of the Data Protection Act 1998 (DPA).
22. The first data protection principle requires that personal data shall be processed fairly and lawfully.
23. A full text of section 40 of the Act is available in the Legal Annex at the end of this Notice.

Is the information personal data?

24. When considering whether the information is personal data the Commissioner has taken into account his own published guidance: '[Determining what is personal data](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf)' which can be assessed at: http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf
25. From his guidance there are two questions to be answered in the affirmative when deciding whether the information, if disclosed to the public, would constitute the personal data of an individual:
 - (a) Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?
 - (b) Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?
26. Although the withheld information does not specifically identify the individual concerned (as it simply refers to their age, grade and pay scale) it is apparent to the Commissioner that this information together with other information in the possession of or likely to come into the possession of members of the public would be sufficient to identify that person. The Commissioner has seen a document in the public domain which identifies the individual concerned (both by name and photograph) and their connection with HPA. The Commissioner believes that it would be possible to link the requested information to this information. He is therefore satisfied that the information requested is personal data within the meaning of the DPA as it identifies and relates to a living individual.

Would disclosure contravene the first data protection principle?

27. The Commissioner recognises that the disclosure of an individual's age, grade and pay scale would not always be unfair. However, in this case the disclosure of this information would effectively reveal the identity of the individual concerned and the fact that they had taken early retirement. In considering whether disclosure would be unfair and contravene the first data protection principle, the Commissioner has taken the following factors into account:

- a. The reasonable expectations of the individual concerned about what would happen to their personal data
- b. Whether the individual specifically refused consent
- c. Whether the information relates to the individual's personal and private life or their public life
- d. The seniority of the position and the role of the individual
- e. Unnecessary or unjustified distress or damage to the individual
- f. The legitimate interests of the public in knowing the identity of the individual who had taken early retirement
- g. The unwarranted prejudice to the rights and freedoms or legitimate interests of the individual

a. Reasonable expectations

28. An individual's reasonable expectation as to whether their personal data will be disclosed is a relevant factor. However, in the absence of other factors disclosure will not be automatically unwarranted or unfair just because the person is unaware of the possibility of disclosure. In this case HPA has informed the Commissioner that the individual concerned would not expect the details of their retirement, age, grade and pay scale to be disclosed to the public at large. Although an individual may expect details of their grade and pay scale to be disclosed in the ordinary course of their public life, the Commissioner believes that they would have a reasonable expectation to have this information withheld if it reveals their identity and the fact that they have taken early retirement.

b. Consent refused

29. Although an individual's objection to disclosure is a relevant factor, it is not automatically enough to make the disclosure unwarranted or unfair. In this case the HPA has informed the Commissioner that the individual has been led to believe that details of their retirement, age and grade would be kept confidential. The Commissioner agrees that an individual would have a reasonable expectation that their retirement (particularly if taken early) would be kept confidential. However, the

same would not normally apply to their grade and pay scale when employed.

c. Personal and private or public life

30. The Information Commissioner's Office has produced Awareness Guidance on section 40 of the Act, which makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) as opposed to their public life (i.e. their work as a public official or employee) it will deserve more protection than information about them acting in an official or work capacity. The Commissioner takes the view that the early retirement of an individual relates more to their private as opposed to public life.

d. Seniority and roles

31. The above Awareness Guidance on section 40 of the Act, also makes it clear that public authorities should take into account the seniority of employees when personal information about their staff is requested under the Act. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (e.g. the official's family). However, 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. The seniority of the individual concerned is less relevant in this case as the requested information relates to their retirement and pension which are essentially private issues.

e. Unnecessary or unjustified distress or damage to the individual

32. HPA has informed the Commissioner that disclosure of the requested information would cause the individual unnecessary or unjustified distress or damage. The Commissioner takes the view that the circumstances surrounding someone's retirement can be sensitive and accordingly there is a strong privacy argument. Furthermore, disclosing that someone has taken early retirement by definition reveals something about their age (i.e. that they are below normal retirement age). This is personal and private information which the Commissioner believes deserves a level of protection from disclosure. In this case the complainant has requested the individual's actual age not just the fact that they have retired before the normal retirement age for the HPB.

f. Legitimate interests of the public

33. The Commissioner takes the view that there is not generally a great public interest in knowing whether someone has taken early retirement unless the individual concerned is senior and the circumstances that surrounded their retirement are controversial. For example, where someone takes early retirement following an investigation into their alleged fraud, mismanagement or misbehaviour. In this case there is no evidence of any controversial circumstances surrounding the individual's departure.

The complainant believes that there is a public interest in knowing whether someone has taken early retirement (particularly if the individual is quite senior). This is because in such circumstances the HPB may have to pay the pension fund a '[special charge](#)'¹ in addition to the pension payments. This means the expenditure of additional public money for which there is a public interest in disclosure on the basis of transparency and accountability. Furthermore, the complainant has suggested that early retirement has been refused for staff below management grade implying that the employer's discretion may not have been exercised fairly. The Commissioner recognises that any early retirement may result in a special charge being made and this is additional money which should be accounted for. Furthermore, he accepts that early retirement can only be made with the employer's consent. However, the Commissioner has taken into account the pension scheme rules and HPB's policy on the early payment of benefits which he believes should satisfy the public interest for accountability, transparency and fairness. The HPB's policy on the early payment of benefits states that the HPB will consider applications for early benefits with regard to the circumstances surrounding each case. It goes on to state that decisions will be made on the merits of each case having regard to the operational requirements of the employing section, HPB's ability to meet the cost of granting such a request, whether any demonstrable cost saving in excess of potential savings available under any severance arrangements in place from time to time, can be made and the member's personal circumstances. Furthermore, the [Local Government Pension Scheme Regulations 2007 \(as amended\) \(LGPSR\)](#) permits a right of appeal against any decision made under the scheme. On the basis that there are rules and policies by which any request for the early payment of benefits must be considered and taking into account that HPA's financial control framework is audited annually and the LGPSR provide an appeal facility, the Commissioner believes that this is sufficient to satisfy the public's interest for transparency and accountability.

¹ <http://www3.hants.gov.uk/pensions/pensionsthinkingaboutretiring/pensionshowearlycanyouretire.htm>

h. Unwarranted processing by reason of prejudice to the rights and freedoms/legitimate interests of the data subject

34. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects.
35. On balance the Commissioner does not believe in this case that any legitimate interests the public may have in knowing an individual's age, or that they took early retirement (which would be revealed by releasing their grade and pay scale) would outweigh any unwarranted prejudice that might be caused to their rights, freedoms and legitimate interests for the reasons stated above.
36. The Commissioner has concluded that the information requested was correctly withheld by the council under section 40(2) of the Act.

The Decision

37. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

38. The Commissioner requires no steps to be taken.

Right of Appeal

39. 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

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.

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 26th day of April 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

The Freedom of Information Act 2000

Section 40 – Personal information

(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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

- “data subject” means an individual who is the subject of personal data;
 - “personal data” means 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;
 - “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a) organisation, adaptation or alteration of the information or data,
 - (b) retrieval, consultation or use of the information or data,
 - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d) alignment, combination, blocking, erasure or destruction of the information or data;
 - “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.
- (2) In this Act, unless the context otherwise requires—
- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
 - (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.
- (3) In determining for the purposes of this Act whether any information is recorded with the intention—
- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.