

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 12 January 2011**

**Public Authority:** Coventry City Council  
**Address:** 1 Civic Centre  
Little Park Street  
Coventry  
West Midlands  
CV1 5RS

### Summary

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On 13 July 2009 the complainant contacted Coventry City Council to request all the information the public authority sent to the Local Government Ombudsman (the LGO) in connection with a complaint surrounding the care of her sister by a named day care centre run by the public authority. The public authority refused to disclose the requested information under the provisions contained within section 40(2) of the Freedom of Information Act 2000 (the Act). The Commissioner has investigated and finds that the public authority should have neither confirmed nor denied whether information was held by virtue of section 40(5)(b)(i). He does not require any remedial steps to be taken.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 13 July 2009 the complainant contacted the public authority to request the following information in connection with a complaint

surrounding the care of her sister by a named day care centre run by the public authority:

*"Please provide a copy of all documents sent to the Local Government Ombudsman by Coventry City Council in relation to the complaint [reference redacted]. This is a formal request under the DPA and FoIA."*

3. The request was received by the Council on 23 July 2009.
4. On 20 August 2009 the public authority responded to the complainant refusing to disclose the requested information on the basis of the exemption contained in section 40(2) of the Act.
5. On 24 August 2009 the complainant requested an internal review of the public authority's decision.
6. On 1 October 2009 the public authority wrote to the complainant with details of the result of the internal review. The internal review upheld the Council's original decision.

## **The Investigation**

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### **Scope of the case**

7. The complainant brought a complaint under the Data Protection Act 1998 (the DPA) to the Commissioner regarding a subject access request that she had submitted to the public authority. The complainant then sought the remainder of the information that was not her own under the Act. The complaint regarding the public authority's handling of the information request was passed to the Commissioner on 26 March 2010 for consideration under the Act. The complainant specifically asked the Commissioner to consider the fact that the public authority had withheld the information as personal data of a third party under section 40(2) of the Act.

### **Chronology**

8. On 4 May 2010 the Commissioner wrote to the complainant to outline the scope of the case and detail his subsequent investigation.
9. On 11 May 2010 the complainant responded to the Commissioner raising a number of issues with the scope of the case he had outlined previously.

10. On 27 May 2010 the Commissioner responded to the complainant. He addressed the points raised in her previous correspondence and detailed his initial findings on the case. The Commissioner invited the complainant to withdraw her complaint if she accepted his initial findings.
11. On 15 June 2010 the complainant responded to the Commissioner reiterating concerns she had raised in previous correspondence and informed the Commissioner that she did not wish to withdraw her complaint.
12. On 16 June 2010 the Commissioner responded to the complainant. He clarified the complainant's areas of concern and confirmed he would progress the case to a Decision Notice.
13. On 16 June 2010 the Commissioner wrote to the public authority to outline the scope of the case and invite it to provide any further arguments regarding its handling of the request.
14. On 16 August 2010 the public authority provided a substantive response to the Commissioner.

## **Analysis**

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### **Substantive Procedural Matters**

15. The full text of the relevant provisions of the Act referred to in this section is contained within the Legal Annex.
16. In considering whether the exemptions are valid, the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public.
17. The public authority did not apply section 40(5)(b)(i) in this case, nor did it explicitly cite section 40(2) as grounds upon which to withhold the information requested. However, the public authority did rely on its view that the information was the personal data of third parties as the reason not to disclose it. Even if it was not specific about exactly what information it held, it therefore indicated that it held information pertaining to the request. The Commissioner has decided that citing

section 40(5) was in fact the correct course for the public authority to have taken, for the following reasons.

### **Exemption: Section 40(5)**

18. Section 40(5) provides an exemption from the duty to confirm or deny for information which is the personal data of an individual other than the applicant. Although the public authority failed to consider this subsection, the subject matter of the case prompted the Commissioner to consider whether the public authority would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).
19. The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights are set out in the DPA, legislation which the Commissioner also regulates, and are closely linked to article 8 of the Human Rights Act. The Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without having considered these rights, even where the legislation has not been cited specifically.
20. Generally, the provisions of section 40(1) to (4) provide various exemptions relating to personal data of an individual other than a requester. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from confirming or denying that it holds information if to do so would itself contravene any of the data protection principles of the DPA.
21. The DPA defines personal information 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 intention of the data controller or any other person in respect of the individual.'*

The Commissioner is of the view that whether or not information was held by the public authority – as a result of concerns raised regarding

the care of an elderly person – any such information would constitute the personal data of the individuals involved.

22. He would therefore like to clarify that even confirming or denying whether information is held would reveal whether or not concerns had been raised and if any investigation had resulted from them, and this has resulted in him considering the case in a different manner to the public authority.
23. In light of the above, the Commissioner considers that the proper approach would be to first consider whether or not, in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a) (i.e. the duty to inform a requester whether it holds information of the description specified in the request).
24. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying the information was held would contravene any of the data protection principles.

***Would complying with section 1(1)(a) contravene the first data protection principle?***

25. The first data protection principle states that:

*"Personal data shall be processed fairly and lawfully..."*

In considering whether or not confirming or denying information was held would contravene the first data protection principle, the Commissioner has taken into account the reasonable expectations of any data subjects who may be identifiable from the information, the legitimate interests of the public, and the rights and freedoms of any named individual or individuals.

26. The Commissioner is satisfied that individuals involved in the care of an elderly adult, and that elderly adult herself, would have a reasonable expectation of privacy and would not expect the public to have access to information which discloses whether or not concerns had been raised or an investigation into the care of an elderly person had been undertaken.
27. The Commissioner understands that the public has a legitimate interest in knowing that professionals caring for elderly people are fit to practice. However, he also has to consider the individuals involved and their right to privacy. Whilst it may be true that the release of

information could be useful to the public, for example when complaints are upheld, the Commissioner does not believe that the public interest in disclosure in this case outweighs the unfairness to the data subjects involved.

28. The Commissioner is satisfied that confirming or denying whether this information was held would contravene the fairness element of the first data protection principle. Therefore, he has determined that the public authority should have applied the provisions of section 40(5)(b)(i) of the Act and neither confirmed nor denied holding the requested information.
29. Given this conclusion he has not gone on to consider the other data protection principles.

## **The Decision**

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30. The Commissioner's decision is that the public authority should have neither confirmed nor denied whether information was held, in accordance with section 40(5)(b)(i) of the Act.

## **Steps Required**

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31. The Commissioner requires no steps to be taken.

## **Other matters**

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32. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint.
33. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days

from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner has noted that in this case the public authority took 28 days to complete the internal review and he is not satisfied that there were any exceptional circumstances to justify this despite the publication of his guidance on the matter.

## Right of Appeal

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

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

**Dated the 12<sup>th</sup> day of January 2011**

**Signed .....**

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

## Legal Annex

### Personal information.

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

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

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) 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 that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 40(6)** provides that –

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

**Section 40(7)** provides that –

In this section-

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

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