



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 24 May 2006

Public Authority: London Borough of Sutton

**Address: Civic Offices
St Nicholas Way
Sutton
Surrey
SM1 1EA**

Summary Decision and Action Required

The Commissioner's decision in this matter is that the public authority has partly dealt with the Complainant's request in accordance with Part I of the Act. The Commissioner has agreed with the public authority the release of additional information in the form of a summary.

1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

- 2.1 The Complainant has advised that on 1 January 2005 the following information was requested from the public authority in accordance with section 1 of the Act.
- 2.2 "All information held by the Council's Trading Standards Service on [name deleted].

In their reply dated 31 January 2005 the London Borough of Sutton ('the Council') told the Complainant that they had received two complaints (one from the Complainant himself) and one enquiry over the previous twelve months. All other information was refused. The Council cited sections 30(2): 40 and 41 of the Act. The Complainant sought a review of that decision in a letter dated 1 February 2005. This was not completed until 18 May 2005: the Council did not, however, release any additional information to the complainant.

Section 30(2) of the Act states that:

'Information held by a public authority is exempt information if- (a) it was obtained or recorded by the authority for the purposes of its functions relating to (i) investigations falling within subsection (1)(a) or (b), (ii) criminal proceedings which the authority has power to conduct.'

Subsections 1(a) and (b) of section 30 state that: "*Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-*

'(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained- (i) whether a person should be charged with an offence, or (ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has the power to conduct.'

Section 40(2) of the Act states 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) of the Act states that:

'The first condition is – (a) in a case where 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 41(1) of the Act states that:

'Information is exempt information if- (a) it was obtained by the public authority from any other person(including another public authority), and (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person'.

3. Relevant Statutory Obligations under the Act

Section 1(1) provides 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.”

4. Review of the case

4.1 The Complainant asked the Commissioner to review the decision not to release the information he sought.

4.2 In carrying out his review the Commissioner examined the information withheld by the Council. The Complainant, who had had dealings with a company which he regarded as unsatisfactory, had asked to see all the information held by the Council's Trading Standards Services in respect of that company. While willing to release to the Complainant the total number of complaints and enquiries received, the Council would not release any further information. That further information consists significantly of third party data relating to those complaints and enquiries.

4.3 In justifying their decision not to release any additional information to the Complainant, the Council have taken the view that the information sought was information obtained by them in confidence while carrying out their regulatory functions. They remain of the view that such regulatory functions cannot be carried out satisfactorily unless confidentiality is maintained. They cited the three sections of the Act referred to above in support of that decision. However although section 30, which relates specifically to the matter of regulatory functions, is a qualified exemption and therefore requires the application of the public interest test, the Council provided no evidence to suggest that they had at any time addressed the question of the public interest and how that might apply in this case.

- 4.4 The Commissioner has noted that most of the information withheld by the Council was information relating to third parties. This information was either provided direct (in one case through another Council) or obtained during the course of the Council's investigative processes. The Commissioner recognizes that the information was held by the Council entirely in consequence of the Council carrying out their regulatory responsibilities. The Commissioner therefore accepts that the information sought falls within section 30(2) of the Act.
- 4.5 However, the public interest test needs to be applied in respect of this section of the Act. That test has not been applied by the Council, and the Council merit criticism for that failing. The Commissioner has considered the public interest aspects of this matter. The Commissioner fully recognizes that the Council, when pursuing their regulatory functions, need to do so on a confidential basis and that the public interest is best served if the Council, in order to carry out their functions successfully, are not required to share information beyond those who, during the course of an investigation, need to know it.
- 4.6 The information sought by the Complainant, however, relates to regulatory functions that have been completed. The Commissioner is of the view that the argument for withholding information is significantly weaker in cases which are no longer active and that, in such cases, the public interest in understanding how regulatory processes work and seeing that they have been carried out effectively is likely to outweigh the public interest in maintaining the exemption. The Commissioner is of the view, therefore, that more information could be released to the Complainant.
- 4.7 However, the Council have also cited section 40(2). They said that some of the information related to living individuals and that disclosure of it might result in breaches of the Data Protection Act 1998 ("the Data Protection Act"). The first data protection principle relates to the fair and lawful processing of personal data. It states 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."
- 4.8 The Commissioner recognizes that much of the information held by the Council has been directly provided to them by individuals in order to assist the Council in carrying out their regulatory functions. That information includes personal data. In carrying out those functions the Council will also have obtained or recorded personal data about other individuals involved with the body subject to investigation. The Commissioner accepts that all such data will be held purely for the purpose of carrying out the relevant regulatory function.
- 4.9 The Commissioner has been provided with no evidence to confirm that information was provided to the Council on a confidential basis, nor have the Council been specific as to the breaches of the Data Protection Act they envisage. However, the Commissioner is of the view that, in the absence of consent, individuals

whose personal data was either provided to the Council or obtained by them as part of the regulatory function would have a reasonable expectation that such information would be treated as confidential and not subject to any wider processing: in particular, the Commissioner notes that some of the information constitutes sensitive personal data as defined by Schedule 3 of the Data Protection Act. He is of therefore of the view that release of this information would not constitute fair and lawful processing as defined by the Data Protection Act.

- 4.10 The Commissioner therefore believes that additional information should be given to the Complainant if possible but that the requirements of section 40(2) mean that this will necessarily be limited in nature. (The Commissioner notes also, in that context, that the Council have additionally cited section 41 of the Act (Information provided in confidence), which is an absolute exemption). He is therefore of the view that this can best be achieved by the release of a summary. He so recommends. A copy of the summary is attached to this Decision Notice.
- 4.11 In respect of handling matters, the Commissioner has noted that, although the Complainant wrote on 1 February 2005 to appeal against the Council's decision to withhold the bulk of the information sought, no substantive reply to his letter was sent until 18 May 2005. This delay merits his criticism.

5. The Commissioner's Decision

- 5.1 The Commissioner's decision in this matter is that the Council have correctly identified the information sought as falling within sections 30(2) and 40 of the Act although the Council failed to apply the public interest test required by section 30. The Commissioner has decided that some additional information could be provided to the Complainant without breaching the requirements of either of those sections. That information should most appropriately be provided in the form of a summary.

6. Action Required

- 6.1 The Commissioner is of the view that, in the light of the decision above, there is no action that the Council is required to take. The summary referred to in paragraph 5 is attached to this Decision Notice.

7. Right of Appeal

- 7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

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

Reference: FS50070184

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

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

Dated the 24th day of May 2006

Signed

**Graham Smith
Deputy Commissioner**

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