

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 July 2007

Public Authority: Pembrokeshire County Council
Address: County Hall
Haverfordwest
Pembrokeshire
SA61 1TP

Summary

1. The complainant requested details of complaints made to the public authority against his client and the names of those who made the complaints. The public authority refused the request, citing section 41 of the Act (information provided in confidence). During the course of the investigation the complainant stated that he wanted the names of the individuals who had made the complaints and was no longer interested in receiving the details of those complaints. The Commissioner's decision is that the public authority applied the Act appropriately in withholding the names by virtue of section 41 of the Act. Furthermore, the Commissioner considers that the names of the individuals could have been withheld by virtue of the section 40 exemption (personal information).

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 (the 'Act'). This Notice sets out his decision.

The Request

3. The complainant acts on behalf of an organisation that has been the subject of complaints made to the public authority. On 2 June 2006 the complainant requested the following information from the public authority:

"... details of the complaints [made against the complainant's client] and the persons who have made them ..."

4. The public authority responded on 28 June 2006, refusing the request by virtue of the exemption at section 41 of the Act.
5. On 3 July 2006 the complainant requested an internal review of the decision to refuse his request. The public authority responded on 30 August 2006, upholding its initial decision to withhold the information requested by virtue of the section 41 exemption.

The Investigation

Scope of the case

6. On 1 September 2006 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 whether the public authority had applied the section 41 exemption inappropriately.
7. During the course of the investigation, the complainant informed the Commissioner that he was interested in only the names of the complainants and that he no longer required the details of the complaints. This Notice therefore only considers the question of the names of the complainants rather than the details of the complaints.
8. In addition, the Commissioner has looked into whether the information withheld is the 'personal data' of the individuals who made the original complaints to the public authority, and accordingly whether the section 40 exemption is applicable in this case.

Chronology of the case

9. On 2 April 2007 the Commissioner contacted the public authority to seek further details about the refusal of the complainant's request for information. The public authority responded on 18 April, providing the Commissioner with copies of the information withheld.
10. The Commissioner contacted the public authority on 26 April 2007 to ask whether it would be prepared to release anonymised summaries of the complaints received. The public authority responded on 27 April, agreeing to disclose summaries of the complaints.
11. On 21 May 2007 the Commissioner contacted the complainant. The Commissioner explained that it was his preliminary view that the public authority had applied the Act appropriately in withholding the names of the individuals who had made complaints. This is because it is likely that the section 41 exemption had been applied appropriately, but in any case the names would be exempt by virtue of section 40 of the Act. In terms of the details of the complaints, the Commissioner explained that the public authority had agreed to disclose anonymised summaries to the complainant if he wished to receive them.

12. On 20 June 2007 the complainant contacted the Commissioner to state that he wanted the Commissioner to issue a formal Decision Notice in this case. The complainant also stated that he did not require the anonymised summaries of the complaints, and that he was only interested in the disclosure of the names of the complainants.

Findings of the case

13. The complainant in this case acts on behalf of a business that was the subject of a number of complaints to the public authority. The public authority's trading standards team subsequently raised a number of issues with the business. The request for information relates directly to the complaints received by the public authority.

Analysis

14. The Commissioner has considered the public authority's response to the complainant's request for information.

Exemptions

Section 41 – information provided in confidence

15. Section 41(1) of the Act provides an absolute exemption for information provided to the public authority by another person, the disclosure of which would constitute an actionable breach of confidence. All sections of the Act referred to in this Notice are set out in full in the Legal Annex.
16. In this case, the Commissioner is satisfied that the information withheld was obtained by the public authority from 'any other person', in this case the individual complainants themselves.
17. The Commissioner considers that for a breach of confidence to be actionable it must meet the established tests in *Coco V Clark* (*Coco v AN Clark Ltd* [1969] RPC 41). The requirements are that the information must have the necessary quality of confidence; it must be imparted in circumstances giving rise to an obligation of confidence; and there is an unauthorised use of that information to the detriment of the party communicating it. Each of these requirements is considered below.
18. In order for information to have the necessary quality of confidence, it must be something that is worthy of protection – i.e. it must be something that is not trivial and not generally known or publicly available by other means. In this instance the identities of the complainants are not widely known and are not in the public domain. Accordingly, the Commissioner believes that the information withheld does have the necessary quality of confidence.
19. The public authority has argued that there was an obligation of confidence when

the information was provided by the complainants. The authority believes that individuals wishing to make complaints have a legitimate and reasonable expectation that the information they provide would be kept confidential.

20. The Commissioner believes that an obligation of confidence did exist at the time that the information was provided to the authority, and that the reasonable expectation of the confiders would have been that their identities would not be disclosed to third parties.
21. The Commissioner further considers that, in all the circumstances of the case, if the identities of the complainants were divulged then there is a definite risk of detriment being suffered by the confiders.
22. Although section 41 is an 'absolute' exemption, the law of confidence provides its own in-built 'public interest test' in that a public interest defence can be made in cases of breach of confidence. The Information Tribunal (Derry City Council vs the Information Commissioner – EA/2006/0014) has ruled that a similar balancing exercise should be applied to section 41 cases as that used in 'qualified' exemptions. The Commissioner has therefore considered whether the public authority could adopt a public interest defence to any action taken against it for breach of confidence if the information were to be disclosed.
23. The Commissioner acknowledges that there is a public interest in public authorities being open and transparent in their dealings with the public and other organisations, including any complaints that are received by the public authority. The Commissioner has also considered the argument raised by the complainant, that it is unfair to his client that he does not know the identities of those individuals who made complaints to the authority. However, the Commissioner recognises that there is a strong public interest in maintaining the anonymity of individuals who have made complaints about third parties. There is a significant risk that, should the identities of such individuals be routinely available, fewer individuals would be willing to make complaints. This could undermine the ability of public authorities to investigate and take appropriate action.
24. In all the circumstances of the case, therefore, the Commissioner is satisfied that the public interest in the disclosure of the information does not outweigh the public interest in maintaining the confidence.

Section 40 – personal information

25. In its refusal notice of 28 June 2006 the public authority did not cite the exemption at section 40 of the Act. The Commissioner recognises he is not under any obligation to consider exemptions not raised by the public authority. Nevertheless, as the Tribunal has stated in *Bowbick vs the Information Commissioner* (EA/2005/0006):

"If the Commissioner considered that there was a s.40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may

be a breach of the data protection rights of data subjects” (Bowbrick, paragraph 51).

26. The Commission considers this particular case to be such a scenario. Section 40(2) of the Act allows public authorities to exempt information that constitutes personal data, the disclosure of which would breach any of the data protection principles (as set out in the Data Protection Act 1998). In this case the names of the individuals who made complaints clearly constitute their own personal data, and the Commissioner believes that disclosure would breach the first data protection principle, which states that data must be processed ‘fairly and lawfully’.
27. When looking at fairness, the Commissioner considers the expectations of the data subjects together with the likely consequences of processing on those individuals. In this case the individuals provided their identities in the legitimate expectation that these would not be released. Furthermore, it is possible that those individuals would suffer a detriment if their identities were to be disclosed and therefore it would be unfair for the public authority to disclose the names of the individuals.

The Decision

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

Steps Required

29. The Commissioner requires no steps to be taken.

Right of Appeal

30. 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 3rd day of July 2007

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

General Right of Access

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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

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) he 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.

Information provided in confidence

Section 41(1) provides 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."

Section 41(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."