

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 June 2008

Public Authority: De Montfort University ("the public authority")
Address: The Gateway
Leicester
LE1 9BH

Summary

The complainant requested information relating to the salaries of senior staff at the public authority. The public authority made limited disclosures within the scope of this request but withheld certain information which would identify individuals' salaries. It argued that disclosure would be unfair and in contravention of the first principle of the Data Protection Act 1998. As such it was exempt under Section 40(2) of the Act. It argued that the information was also exempt under Sections 41 and 43 of the Act. The Commissioner has decided that all the withheld information is exempt under Section 40(2) of the Act. He has therefore not considered whether the other exemptions cited are also applicable. However, the Commissioner has found that the public authority failed to comply with a number of its procedural obligations under section 17 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.

The Request

2. On 11 February 2006, the complainant, acting on behalf of a branch of a trade union which represents a section of employees at the public authority, requested the following information:

"1. Pay for the Vice Chancellor

Can you please provide details of the salary, and any additional payments (including performance payments) made to the Vice Chancellor in the financial years 2001-2, 2002-3, 2003-4, and 2004-5.

2. Pay for senior management team

Can you please provide details of the salary, and any additional payments (including performance payments) made to the members of the senior management team including the Deputy Vice-Chancellor, Pro Vice-Chancellors, Director of Human Resources, Director of Finance, Director of Corporate Affairs in each of the financial years 2001-2, 2002-3, 2003-4, and 2004-5.

3. Pay for Deans

Can you please provide details of the salary, and any additional payments (including performance payments) made to the Deans of Faculties in each of the financial years 2001-2, 2002-3, 2003-4, and 2004-5.

Where there has been a change of post holder in that period, please simply state the salary for each post."

3. The public authority responded on 8 March 2006 advising how to access all the information it held in relation to question 1 and how to access some of the information it held in relation to questions 2 and 3. In relation to the remainder of the information it argued that disclosure may breach one of the principles of the Data Protection Act 1998 (DPA98). It stated "*We would not be prepared to identify the personal salary of any member of staff*". It described the applicable exemption under the Act as being a "*conditional exemption*" although it did not state which one it sought to apply.
4. In a letter dated 11 April 2006, the complainant asked for a review of this refusal focusing on questions 2 and 3.
5. The public authority responded to this request for a review of its initial refusal in a letter dated 8 May 2006. In its review, the public authority stated that the information caught by the scope of question 1 was accessible by other means, namely via its publication scheme and was therefore exempt by virtue of Section 21 (Information Accessible by Other Means).

6. In relation to questions 2 and 3, it stated that the information was exempt by virtue of Sections 40 (Personal Data), 41 (Information Provided in Confidence) and 43 (Prejudice to Commercial Interests). It also argued that the balance of public interest favoured maintaining the exemptions at Sections 40 and 43.
7. It advised that it had consulted each of the 11 individuals involved and all had stated that they were unwilling for information about their salaries and related information to be disclosed.
8. It offered to provide salary information in groups or categories which did not identify staff and asked the complainant to get back in touch if he wished to take this up.
9. The complainant wrote again to the public authority on 11 September 2006, challenging it to provide further reasoning. He invited the public authority to make the further proposed disclosure and said that he would decide whether or not to complain to the Commissioner once he had seen it.
10. The public authority responded on 10 October 2006. It provided a table of information with relevant salary bands for the post holders. It also referred to disclosures made by similar public authorities in response to requests from other branches of the same trade union. It reported its understanding that these responses had been considered satisfactory by those other branches.

The Investigation

Scope of the case

11. On 29 October 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 the following points:
 - Whether the exemptions cited were applicable to this information. He referred specifically to Section 40 arguing that the public authority's position did not accord with the approach taken by the Commissioner in his published Awareness Guidance Note 1.
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf

For the sake of clarity the analysis below relates to the information that is within the scope of the request and which has been withheld. The Commissioner has not made a decision in respect of salary band information as this material was released to the complainant prior to him lodging his complaint on 29 October 2006.

12. He also provided information from his trade union's head office which appeared to contradict the public authority's reported understanding as to the opinions of other branches in relation to similar disclosures.

Chronology

13. The Commissioner wrote to the public authority on 10 September 2007. He asked the public authority to provide a copy of the withheld information and asked the public authority to respond to a series of questions regarding the application of the exemptions it had cited.
14. He asked the public authority to confirm which subsection of Section 40 it sought to rely on. He also asked the public authority to provide further submissions as to the relative fairness of disclosing salary information where that relates to senior staff members.
15. The Commissioner challenged the public authority's reliance on Section 41 commenting that the exemption cannot cover information that the public authority has created itself. It asked for the public authority's further arguments in this regard.
16. The Commissioner also asked for further submissions regarding the application of Section 43. Specifically, he asked the public authority to explain why the commercial interests of the university would be affected by releasing this information.
17. The public authority provided a detailed response in a letter of 5 October 2007 which included a copy of the withheld information.
18. In its response, the public authority argued that the withheld information was the personal data of certain members of its staff. It further argued that disclosure of this information would breach the first data protection principle of DPA98. Specifically, it argued disclosure would both unfair and unlawful. It also argued that a DPA98 Schedule 2 condition for processing personal data in this way (i.e., for disclosing the information under the Act) could not be satisfied. Its arguments are examined in more detail later in this notice.
19. It also set out its view that disclosure would constitute an actionable breach of confidence and, as such, the information was also exempt by virtue of Section 41 of the Act. It cited the Commissioner's own guidance, earlier decisions of the Commissioner and case law which it had also cited in support of its arguments on Section 40.
20. With regard to Section 43, it set out why it believed disclosure would have a prejudicial effect on its commercial interests. It said that "*any legitimate public interest concern*" would be assuaged by the disclosure of salary band information which it had already agreed to make available.

Analysis

Procedural matters

21. In its refusal notice of 8 March 2006, the public authority sought to rely on two exemptions, namely Section 21 and Section 40(2) by virtue of Section 40(3)(a)(i). However, it did not specify that these were the exemptions it sought to rely on.
22. It also sought to rely on two further exemptions at internal review, namely Sections 41(1) and 43(2). The internal review provides public authorities with an opportunity to correct any procedural failures within a refusal notice. Therefore the Commissioner will make a decision on the basis of the refusal as it stands at the internal review stage. This approach reflects the decision of the Information Tribunal in the case of *King vs The Information Commission and the Department for Work and Pensions (EA/2007/0085)*.
23. In this case the public authority clarified the particular sections (i.e. 21 and 40) that were deemed to apply at the internal review stage. However it still failed to specify which subsection applied. Therefore it breached section 17(1)(b) in this regard. It also breached section 17(1) in failing to issue a compliant notice within the relevant timescale.
24. At the internal review stage the public authority introduced two further exemptions namely sections 41 and 43. In only citing these exemptions at this stage, outside the time for compliance, the public authority breached section 17(1). It also breached section 17(1)(b) as it failed specify which subsection of each of the exemptions applied. Furthermore it breached section 17(1)(c) as it did not explain why the exemptions applied.
25. In relation to Section 43, the only exemption it cited which is qualified by a balance of public interest test, it also failed to state the reasons for claiming that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure. In failing to do so, it contravened Section 17(3)(b) of the Act. Full details of Section 17 are given in a legal annex to this Notice.

Exemption

26. The public authority sought to rely on three exemptions in relation to the information which was not accessible to the complainant by other means, namely, Section 40(2) by virtue of Section 40(3)(a)(i), Section 41 and Section 43. It is this information which is the focus of this notice. Full details of each exemption are given in a legal annex to this Notice.

Section 40 – Personal Data Exemption

27. The public authority has argued that the information in question is personal data and its disclosure would contravene the requirements of the first data protection

principle. As such the information is, in the public authority's view, exempt from disclosure under Section 40(2) by virtue of Section 40(3)(a)(i) of the Act.

28. The Commissioner has considered the public authority's arguments in two parts. Firstly, is the withheld information personal data? If it is not, Section 40(2) cannot apply although one or more of the other exemptions cited may apply. Secondly, if it is personal data, would the disclosure of that personal data contravene the requirements of the first data protection principle?

Is the withheld information personal data?

29. When considering this point, the Commissioner had regard to his own recently published Technical Guidance Note entitled "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
30. This Note provides an example of information which constitutes personal data as follows: "*Data about the salary for a particular job may not, by itself, be personal data. This data may be included in the advertisement for the job and will not, in those circumstances, be personal data. However, where the same salary details are linked to a name (for example, when the vacancy has been filled and there is a single named individual in post), the salary information about the job will be personal data 'relating to' the employee in post.*" (Page 10, Version 1.0 21.08.07)
31. The Commissioner has seen the withheld salary information. No individuals' names were provided with each figure. The Commissioner therefore had to consider whether individuals' names could be readily linked to the salary figures information in question.
32. The Technical Guidance Note also considers the question of linking raw data back to identifiable individuals. In this analysis, it refers back to Recital 26 of the EU Directive (Directive 95/46/EC) from which DPA98 is derived.
- "In these cases, Recital 26 of the Directive states that, whether or not the individual is nevertheless identifiable will depend on 'all the means likely reasonably to be used either by the [data] controller or by any other person to identify the said person'."* (Page 6, Version 1.0 21.08.07).
33. This point is addressed in further detail in the Technical Guidance Note as follows:
- "When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies."*
34. The Commissioner believes that if this information were to be put into the public domain it would be relatively easy for employees of the public authority to work out which figure related to which post holder at the public authority. This is in

view of the relatively small number of posts the information relates to and factors such as length of service. The Commissioner is therefore satisfied that the information in question is personal data subject to the requirements of DPA98, including the first data protection principle.

Would disclosure contravene the first data protection principle?

35. The first data protection principle has two components

- a) Personal data shall be processed fairly and lawfully and
- b) Personal data shall not be processed unless at least one of the conditions for processing in DPA98 Schedule 2 is met.

36. The Commissioner considers that the most applicable condition for processing in this case is likely to be Schedule 2 (6)(1) which states,

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.

37. It is necessary to satisfy both components in order to meet the requirements of the first data protection principle.

38. In considering whether disclosure of the requested information would contravene the requirements of the first data protection principle, the Commissioner has taken into consideration the following factors:

- The reasonable expectations of the individuals as to what would happen to their personal data;
- The seniority of the staff;
- Whether disclosure would cause any unnecessary or unjustified damage or distress; and
- The legitimate interest of the public in knowing remuneration details weighed against the effects of disclosure on the members of staff.

39. The public authority argued that disclosure would be outside the reasonable expectation of the individuals concerned. It said that this stance accorded with its own guidance on DPA98 that it published on its intranet and that it would be reasonable for staff to expect the University to act in accordance with that guidance. It argued that employees were not told at the time they commenced employment that such details might be disclosed to the world at large. Where such a disclosure is proposed, it argued, it would not be fair if the individuals did not consent to it.

40. It also explained that it sought the views of the employees to whom the request relates and each one indicated their objection to the proposed public disclosure of their salary details. Given that disclosure would therefore be contrary to the express objection of the individuals, it would also, in the public authority's opinion

be unfair.

41. It further argued that there was no clear guidance as to when an employee might be considered sufficiently senior to merit publication of their salary details and referred to the Commissioner's own decisions in this regard. It said that in the absence of clear and objective criteria it believed it fell to the public authority to make this determination.
42. It also set out arguments as to why disclosure would be unlawful as well as unfair. It argued that disclosure of employee information would constitute a breach of confidence. As such it would be unlawful. In support of this view it set out both case law and statute as follows:
- Dagleish v Lothian and Borders Police Board [1991] IRLR 422)
 - British Gas Trading Limited and the Data Protection Registrar (now called the Information Commissioner) (DA98 3/49/2)
 - Human Rights Act 1998
 - Campbell v Mirror Group Newspapers Limited ([2004] UKHL 22, 6 May 2004
43. The Commissioner has reviewed the information and concluded that the individuals would not have had an expectation that their salary details would be disclosed. However, the fact that an individual has an expectation that information held about them will not be disclosed does not necessarily mean that this expectation is a reasonable one. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:
- "Information which is about the home of family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."*
- http://www.ico.gov.uk/upload/documents/library/freedom_of_information/tailed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf
44. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act. The Commissioner also believes that a distinction can be drawn about the levels of information which junior staff should expect to have disclosed about them compared to what information senior staff should expect to have disclosed about them. This is because the more senior a member of staff the more likely it is that they will be responsible for making influential policy decisions and/or decisions relating to the expenditure of public funds.
45. The information requested is the salary details of the most senior staff at the public authority. The Commissioner considers it is reasonable to conclude that the individuals would expect some details about their salary to be placed in the

public domain but that it is also reasonable to assume that they would not expect their exact salary details to be made publicly available.

46. Whilst disclosure of a salary band may infringe on a person's privacy there is a distinction between this and disclosure of the exact salary details requested. Disclosure of the exact salary details would clearly lead to a greater infringement into the privacy of the individuals as it would reveal the specific details of the person's financial situation. It is therefore reasonable to consider that disclosure of this information would cause the individuals unwarranted distress or unjustified damage. This approach is supported in the decision FS50092819. In this case the public authority released to the complainant details of the salary bands of a number of doctors, however the complainant wanted to know the gross salaries. The Commissioner found:

"The Commissioner has also considered the effect that disclosing details of the gross salaries would have on the data subjects. The Commissioner believes that a clear distinction can be made between effects of disclosure of the salary band for a specialist registrar and the disclosure of the data subject's gross salary. The Commissioner believes that the disclosure of exact salaries would reveal much more about each individual's personal financial situation than the disclosure of the salary bands would."

47. In considering if there is a legitimate interest in the public knowing this information, the Commissioner has considered that the public has a right of access to information about the efficient and proper use of public money. There is also a legitimate public interest in openness and transparency in public bodies in relation to the amount of money it pays its senior managers.
48. The complainant also raised concerns about the use of a performance related element in individuals' pay. He has argued that disclosure would inform an investigation into the hypothesis that performance-related pay contributes to work-related stress.
49. Arguably there is a compelling and legitimate interest in the public learning more about the relative benefits and risks to productivity that performance-related pay in the public sector can bring. It appears to be the complainant's view that where disclosure would add to the investigation of this issue, it might weaken the argument that disclosure would be unfair because a wider legitimate interest (that of furthering the public's understanding) is being served.
50. In the Commissioner's view, disclosure would only inform investigation of this hypothesis if any of the individuals whose salary included a performance-related element was also prepared to make public any work-related stress that they suffered. The Commissioner fails to see how disclosure of detailed salary information relating to individuals could inform such an investigation without corresponding information about work-related stress which relates to the same individuals. In the Commissioner's view, if one or more of the individuals wished to raise concerns about the impact any performance-related element of their pay was having on them, they would be at liberty to do so themselves or via a

nominated representative such as a trade union representative or a legal representative.

51. The Commissioner concluded that the disclosure of the staff members' exact salary details would be unfair and would lead to a greater infringement of their legitimate right to privacy that is not outweighed by the legitimate interest of the public.
52. The Commissioner therefore believes that disclosure of the exact salary details would breach the first data protection principle and that the information is therefore exempt under Section 40(2) of the Act by virtue of Section 40(3)(a)(i).

Other exemptions cited

53. Given that the Commissioner is satisfied that all of the withheld information is exempt from disclosure under Section 40(2) of the Act by virtue of Section 40(3)(a)(i), he has not gone on to consider whether the other exemptions cited by the public authority are also applicable.

The Decision

54. 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:
 - It correctly withheld the requested information under the exemption provided by Section 40(2) of the Act.
55. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - At the internal review stage the public authority did not specify which subsections of sections 21 and 40 applied. In failing to do so it breached section 17(1)(b). In addition, the refusal notice did not refer to the particular exemptions that were being relied on. In failing to issue a compliant notice within the relevant timeframe the public authority breached section 17(1).
 - In failing to issue a notice citing sections 41 and 43 within the relevant timescale the public authority breached section 17(1). It also failed to explain which subsection of each exemption applied and therefore did not comply with section 17(1)(b). Furthermore it did not explain why the exemptions applied and therefore breached section 17(1)(c).
 - In failing to explain its public interest arguments in relation to Section 43, it also contravened Section 17(3)(b) of the Act.

Steps Required

56. The Commissioner requires no steps to be taken.

Right of Appeal

57. 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@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 June 2008

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Section 17 - Refusal of request

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.

- (2) Where—
 - (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
 - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
 - (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where—
 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under subsection (1), (3) or (5) must—
 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 40(1) to (3) – Personal Data Exemption

- (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,

Section 41 – Information Provided in Confidence

- (1) 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.
- (2) 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

Section 43 - Commercial interests

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).