

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 13 July 2009**

**Public Authority:** Ryedale District Council  
**Address:** Ryedale House  
Malton  
North Yorkshire  
YO17 7HH

### Summary

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The complainant requested copies of any correspondence between the council and the Local Government Ombudsman between January 2007 and June 2007. The Commissioner understands that this primarily relates to an investigation carried out by the Ombudsman into allegations of maladministration by the council. A report was published by the Ombudsman on 31 May 2007 as a result of this investigation.

The council responded to the complainant claiming that the information was exempt from disclosure as section 44(1)(a) and (c) (statutory prohibition) applied. It stated that the information was provided to the council by the Ombudsman as part of her investigation and the prohibition from disclosure in section 32(2) of the Local Government Act 1974 (the 'LGA') applied. It also claimed that the information was exempt under section 41 (Information held in confidence)

The Commissioner has considered the information and it is his decision that some of the information is the personal data of the complainant. His decision is that this information is exempt from disclosure under section 40(1) of the Data Protection Act 1998. The council does however need to reconsider whether this information should be disclosed to the complainant under access rights provided by section 7 of that Act.

The Commissioner has also considered the application of section 44 to the information which is not the personal data of the complainant. He is satisfied that the remaining information falls within the scope of the statutory prohibition on disclosure in section 32(2) of the LGA. The Commissioner's decision is therefore that section 44(1) of the Act is applicable to that information. He has not therefore considered the application of section 41 further.

### 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 ("FOIA") This Notice sets out his decision.

## The Request

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2. On 4 July 2007 the complainant made the following request to the authority via email:

"Please would you forward me copies of the correspondence sent by Ryedale District Council to the Ombudsman and/or her office between and including January 2007 and July 2007"
3. The council responded to the complainant on 5 July 2007. It advised her that it held the information requested, but that that information was exempt from disclosure under section 41 (information held in confidence) and section 44 (statutory prohibition) of FOIA.
4. On 8 July 2007 the complainant emailed the council requesting that it reviewed its decision to apply the exemptions. On 20 August 2007 the council responded stating that the information was exempt for the same reasons.

## The Investigation

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### Scope of the case

5. On 19 February 2008 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 the information she had requested should have been disclosed to her.
6. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of FOIA or concern other complaints that have been dealt with separately.

### Chronology

7. The Commissioner wrote to the council on 10 October 2008 stating that a complaint had been received and asking it for a copy of the information together with any further arguments that the council wished to submit in support of its position.
8. The council responded on 24 October 2008 providing the information in question together with further arguments.

9. On 10 February 2009 the Commissioner wrote again to the council asking it to clarify some of its arguments. The council responded on 24 February acknowledging the Commissioner's letter.
10. On 26 February 2009 the Commissioner wrote again to the council stating that after further consideration he no longer needed the council to clarify its arguments.

### Findings of fact

11. The Commissioner notes that the Ombudsman carried out an investigation into the actions of the council, and that she found maladministration in respect of one of the allegations which had been made against it. The Ombudsman's report on this investigation was published on 31 May 2007 entitled "Report on an investigation into complaint no 05/C/09026 against Ryedale District Council". It is available from the Ombudsman's website at [www.lgo.org.uk](http://www.lgo.org.uk).

### Analysis

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#### Exemption

##### Section 40 (Personal information)

12. The Commissioner is the regulator of both the Data Protection Act (DPA) and FOIA. The rights of an individual under DPA, which include the right of access to personal information about themselves, are not compromised by the provisions of FOIA. Section 40 of FOIA provides an exemption relating to personal information in various ways. In *Bowbrick v Information Commissioner* (EA/2005/2006) the Information Tribunal confirmed that the Commissioner can use his discretion to look at section 40 when considering cases under the Act:

*'If the Commissioner considered that there was a section 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....Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.'*

13. In this case the Commissioner has decided, as the regulator of the Data Protection Act, to use his discretion to consider whether section 40(1) applies to the requested information.
14. The Commissioner considers that some of the information is the personal data of the complainant. Personal data is defined in section 1(1) of the Data Protection Act 1998 (the 'DPA'), and is provided in the legal annex to this Decision Notice. It refers to 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,
15. The exemption in section 40(1) states that information which is requested under the Act but which is the personal data of the applicant is exempt. Section 40(1) is provided in this legal annex to this decision notice. The exemption is absolute as regards the application of subsection (1). There is therefore no requirement on the Commissioner to consider the public interest after deciding that the exemption is engaged.
16. The Commissioner therefore considers that this information is exempt under section 40(1) of the Act. The Commissioner has provided the authority with a schedule of information clarifying which information he has decided is exempt under section 40(1) with this Notice. The Commissioner recognises however that the complainant is entitled to request this information under section 7 of the DPA and therefore the council should have recognised this and considered the information for disclosure under the DPA.

#### Section 44

17. The information which has been requested is correspondence between the council and the Local Government Ombudsman between January 2007 and July 2007. This information relates to the Ombudsman's investigation into the council in respect of allegations of maladministration made against it.
18. Section 44(1) of the Act provides that information is exempt information if its disclosure (otherwise than under the Act)
- (a) is prohibited by or under any enactment,
  - (b) is incompatible with any Community obligation, or
  - (c) would constitute or be punishable as a contempt of court.
19. Section 32(2) of the Local Government Act 1974 (LGA) provides, subject to certain exceptions, none of which apply in this case, that:

“Information obtained by a Local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this part of the Act shall not be disclosed.”

Section 32(2) of the LGA is set out fully in the legal annex to this notice. It should be noted that the Local Commissioner referred to in the LGA is referred to in this notice as “the Ombudsman”, to distinguish that office-holder from the Information Commissioner, who is referred to here as “the Commissioner”.

20. The council provided a copy of the information falling within the scope of the request to the Commissioner. The Commissioner is satisfied that the documents consist of information which the Ombudsman either created or was provided with

in the course of her investigation into allegations of maladministration. The Commissioner is therefore satisfied that the information was obtained by the Ombudsman during the course of, or for the purposes of an investigation under the LGA.

21. Accordingly the Commissioner's decision is that the information falls within the prohibition on disclosure in section 32(2) of the LGA, and that the exemption in section 44 (1)(a) of the Act therefore applies. The Commissioner has provided the authority with a schedule of information clarifying which information he has decided is exempt under section 44 with this Notice.
22. Section 44 of the Act is an absolute exemption and therefore the Commissioner has not undertaken an assessment of the public interest test.

### Section 41

23. The council also claimed that section 41 of the Act is applicable to the information. Given that the Commissioner's decision is that sections 40(1) and 44 of the Act are applicable he has not considered the application of section 41 further.

### **The Decision**

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24. 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:
  - The Commissioner's decision is that the public authority was correct to apply section 44(1)(a) to the information.
25. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - The public authority should have considered the information in line with access rights provided under section 7 of the DPA.

### **Steps Required**

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26. The Commissioner requires the council to consider the complainant's right of access under section 7 of the DPA to the information which is the personal data of the complainant.

## Right of Appeal

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27. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

28. 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.
29. 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 13<sup>th</sup> day of July 2009**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## **LEGAL ANNEX:**

### **FREEDOM OF INFORMATION ACT 2000**

#### **Personal information.**

40. - (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.

#### **Prohibitions on disclosure**

44. - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

### **Local Government Act 1974**

- 32(2) Information obtained by a Local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this Part of this Act shall not be disclosed except-

(a) for the purposes of the investigation and of any report to be made under section 30 or section 31 above; or

(b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this Part of this Act, by a Local Commissioner or by an officer of either Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this Part of this Act or for the purposes of an inquiry with a view to the taking of such proceedings, or

(c) for the purpose of any proceedings under section 29(9) above, and a Local Commissioner and the officers of his Commission shall not be called upon to give evidence in any proceedings (other than proceedings within paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this Part of this Act.

**Data Protection Act 1998**

Section 1 of the Data Protection Act 1998 provides that:

“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,