

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 March 2010

Public Authority: Portsmouth City Council
Address: Civic Offices
Guildhall Square
Portsmouth
PO1 2BQ

Summary

The complainant submitted five questions in which he requested information relating to the sale of Council properties to elected members, ex-elected members, officers and ex-officers of the Council since 1979. The Council initially refused the request on the basis that the cost of complying with each question individually would exceed the appropriate limit. During the Commissioner's investigation, the Council determined that it would be able to provide part of the requested information within the appropriate limit. However, the Council withheld this information under section 40(2) of the Act. The Commissioner finds that the Council correctly applied section 12 of the Act to some of the questions. The Commissioner also finds that the Council correctly applied section 40(2) of the Act in respect of the withheld information. However, the Commissioner also finds that the Council breached section 16(1) and section 17(5) 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 26 July 2008, the complainant submitted the following request for information relating to the sale of Council-owned properties since 1979:
 - 1) "Provide details of all properties owned or controlled by Portsmouth City Council that have been sold since 1979 to date, to:
 - a) Elected members of Portsmouth City Council;

- b) Ex-elected members of Portsmouth City Council;
 - c) Officers of Portsmouth City Council;
 - d) Ex-officers of Portsmouth City Council.
- 2) Provide the names of those who have been sold these properties, namely:
- a) Elected members of Portsmouth City Council;
 - b) Ex-elected members of Portsmouth City Council;
 - c) Officers of Portsmouth City Council;
 - d) Ex-officers of Portsmouth City Council.
- 3) Provide the prices that these properties were sold, and the dates they were sold to:
- a) Elected members of Portsmouth City Council;
 - b) Ex-elected members of Portsmouth City Council;
 - c) Officers of Portsmouth City Council;
 - d) Ex-officers of Portsmouth City Council.
- 4) Provide details of whether the people who purchased these properties namely:
- a) Elected members of Portsmouth City Council;
 - b) Ex-elected members of Portsmouth City Council;
 - c) Officers of Portsmouth City Council;
 - d) Ex-officers of Portsmouth City Council.
- owned other properties when they purchased these properties.
- 5) Provide details of any pending purchases of properties owned or controlled by Portsmouth City Council, and the names of those prospective purchasers who are:
- a) Elected members of Portsmouth City Council;
 - b) Ex-elected members of Portsmouth City Council;
 - c) Officers of Portsmouth City Council;
 - d) Ex-officers of Portsmouth City Council."

Throughout this notice, the questions will be referenced using the numbers assigned by the complainant – for example, question one.

3. The Council refused the request on 31 July 2008 stating that it “cannot meet your [the complainant’s] request as it exceeds the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 of 18 hours or £450 and PCC’s own revised policy of 30 hours and £750.” The Council also informed the complainant that “any request for personal information relating to a third party...would be subject to consideration under section 40(2) of the Act and likely to be withheld if it would cause PCC [the Council] to breach data protection legislation.”
4. In its refusal notice, the Council stated that responding to the request would require consideration of properties sold under the Council’s ‘Right to Buy’ scheme, and properties sold outside the ‘Right to Buy’ scheme. The Council indicated that information in relation to these two areas of sales is held in electronic and paper form:

- information relating to properties sold as part of the Right to Buy scheme is not held on a central record of Council property sales, but is held in individual deed or conveyancing packs, which are stored in the Council's Modern Records Department;
- information relating to properties sold outside the scheme are stored on the Council's Asset Management Service (AMS), but complying with the request would also require consideration of archived files relating to the sales.

The Council stated that there were 4400 sales and transfers of property, both under and outside the Right to Buy scheme, which would require consideration in relation to the five questions, and it estimated that it would take around one hour to extract the relevant data from each of these, that is, 4400 hours in total.

5. On 31 July 2008, the complainant submitted a request for an internal review. Following the Council's failure to conduct a review, the complainant contacted the Commissioner on 25 August 2008. The Commissioner did not investigate the complaint at this point because the complainant had not exhausted the Council's review procedure.
6. Following the intervention of the Commissioner, the Council issued the complainant with the findings of its internal review on 24 September 2008. The Council maintained the position set out in its refusal notice.

The Investigation

Scope of the case

7. On 30 September 2008, the complainant contacted the Commissioner. The complainant requested the Commissioner investigate the Council's decision to apply section 12 of the Act (the cost limit).
8. During the course of the investigation, the Council determined that it could provide information to question four of the complainant's request within the appropriate limit. However, the Council considered the information to be third party personal data that was exempt from disclosure by virtue of section 40(2) of the Act. The Commissioner therefore also considered the application of the section 40(2) exemption, but only in relation to question four of the request.

Chronology

9. The Commissioner requested representations from the Council on 10 February 2008 regarding the sections of the Act the Council had applied, and in relation to which parts of the request. The Commissioner requested the Council consider whether any information could be provided within the appropriate limit in line with the recommendations set out at paragraph 14 of the Code of Practice issued under section 45 of the Act. The Commissioner also sought clarification from the

Council as to whether it intended to apply section 40 of the Act in view of its refusal notice.

10. The Council responded on 11 March 2009 confirming that it had “applied section 12 in relation to [the complainant’s] request”. However, the Council also stated that “section 12 applied to each [of the questions contained in the request]”. The Council also advised that it had considered whether the request could be refined in order to provide any information within the appropriate limit, but did not consider this possible. The Council also confirmed that, should it determine that information could be provided within the cost limit, it would consider whether section 40(2) of the Act was applicable.
11. On 3 April 2009, the Council confirmed that it could comply with part of the request at question four within the appropriate limit. The Council confirmed that it would be prepared to disclose a statistic confirming the number of Councillors who owned other properties between 2006 and 2008. However, the Council stated that it considered any further information to be exempt under section 40(2) of the Act.
12. Between 7 May 2009 and 4 March 2010, the Commissioner requested further representations from the Council in relation to its decision to apply section 12 and section 40(2) of the Act, and whether any information could be provided within the cost limit. During this period, the Commissioner clarified that the Council had applied section 12 to questions one, two and three individually. The Council also confirmed that, although information was no longer held in relation to question five, the Council considered that section 12 would also have been applicable to this question individually. In relation to question four, the Council confirmed that it held information which it considered to be exempt by virtue of section 40(2) of the Act.
13. During his investigation, the Commissioner obtained full arguments from the Council, including a detailed breakdown in relation to the Council’s estimate for each question, and the Council’s decision to withhold information under section 40(2) of the Act. During this period, the Commissioner also unsuccessfully attempted to informally resolve the complaint on a number of occasions.

Analysis

Substantive Procedural Matters

Section 12 – exemption where cost of compliance exceeds appropriate limit

14. Section 12(1) provides that a public authority is not obliged to comply with a request where it estimates that the cost of doing so would exceed the appropriate limit.
15. The appropriate limit is set out at regulation 3(1) and 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

In respect of the Council in question, the Regulations state that the appropriate limit is £450. This figure is based on an estimated rate of £25 per person per hour – therefore, the appropriate limit will be exceeded if the Council estimates that the time taken to comply with the request is longer than 18 hours.

16. Regulation 4(3) states that when calculating its estimate, the Council may only take account of the costs it reasonably expects to incur in respect of the following tasks:
- determining whether it holds the information;
 - locating the information, or a document may contain the information;
 - retrieving the information, or a document which may contain the information, and;
 - extracting the information from a document containing it.
17. The Commissioner's guidance on section 12 of the Act¹ states that the Council is not entitled to take into account any time likely to be spent on considering whether an exemption applies to the information requested, or redacting exempt material.

Questions one, two and three

18. Although the Council confirmed that the cost of complying with each of questions one, two and three individually would exceed the appropriate limit, the Council also indicated that the same procedure would be required for complying with each of these questions. As such, the Council provided an estimate in relation to all three questions. The Commissioner has therefore investigated the Council's estimate in relation to all three questions under the same section of this notice.
19. In relation to questions one, two and three, the Council stated that relevant information is held in relation to properties sold under the Right to Buy scheme and properties sold outside of the Right to Buy scheme – the data relating to each is held on separate systems. According to the Council's website², the Right to Buy scheme allows Council tenants to purchase the property which they rent from the Council. As information relating to sales data is stored on two separate systems, and requires two separate calculations to estimate the time required to comply with the request, the Commissioner split his investigation into two parts in relation to these questions.
20. During the course of the Commissioner's investigation, the Council advised the Commissioner that the 4400 hour estimate relating to sales and transfers of properties under and outside the Right to Buy scheme which it provided in its internal review on 24 September 2008, did not include the estimated time required to identify those purchasers who were elected members, ex-elected members, officers and ex-officers of the Council, and to cross-reference this information with the sales data. Although the Council did not include this information in the original estimate, the Commissioner allowed the Council to

¹ http://www.ico.gov.uk/what_we_cover/freedom_of_information/guidance.aspx

² <http://www.portsmouth.gov.uk/living/505.html>

include this information as part of his investigation, as the Council's initial estimate was already in excess of the appropriate limit. This information follows below.

Properties sold under Right to Buy scheme

21. As outlined at paragraph 4 of this notice, the Council stated that information requested in relation to each property sold under the Right to Buy scheme is held in the individual deed or conveyancing packet for each sale. In its notice on 31 July 2008, the Council initially referred to "1900 properties where 4000 transfers of ownership have taken place", although this figure increased following the Council's submission of a detailed estimate to the Commissioner. The Council also suggested that it would take an average of one hour to locate, retrieve and extract the information from each deed or conveyancing packet. Once this information had been obtained, the Council advised that it would need to cross-reference the results with the names of elected members, ex-elected members, officers and ex-officers of the Council.
22. The Commissioner requested further representations from the Council in relation to how it calculated the estimate applicable to each of questions one, two and three – for example, the criteria used in determining that it would take an average of one hour to locate, retrieve and extract the information from each deed or conveyancing packet, and whether the information is stored in any other location or form.
23. During the course of the investigation, the Council determined that it was able to use an in-house computer package, the Geographical Information System (GIS), to produce a spreadsheet of all property sales under the Right to Buy scheme. The GIS indicated a total of 13229 entries from 1979 to date which were relevant to the request.
24. The Council advised that GIS holds various details in relation to properties sold under the scheme, including the name of each purchaser, the address of each property purchased, the price for which each property was purchased, and the date that each property was purchased. However, the Council maintained its position that providing the requested information in relation to each of questions one, two and three would still individually exceed the appropriate limit.
25. In view of the Council's ability to obtain the information requested in relation to questions one, two and three from the GIS system, the Commissioner requested a detailed estimate from the Council, illustrating all steps necessary to answer these questions. The Commissioner also requested the Council's representations as to whether it would be able to provide any information requested within the appropriate limit.
26. In relation to properties sold under the Right to Buy scheme, the Council advised that complying with questions one, two and three of the request would require cross-referencing the sales data obtained from the GIS with the names of purchasers with the names of elected members, ex-elected members, officers and ex-officers of the Council since 1979.

27. The Council advised that it would need to consult annually-produced 'Year Books' for the names and addresses of members and ex-members of the Council since 1979. The Council also advised that it holds electronic records of officers and ex-officers from 2002 to date, but the names of officers and ex-officers from 1979 to 2002 would need to be obtained by manually interrogating each paper personnel file. The Council also advised that it only holds personnel files for 10 years, and could only comply with this aspect of the complainant's request from 1999 onwards.
28. The Council estimated that it would take 44430 hours to comply with questions one, two and three of the request in relation to properties bought under the Right to Buy scheme. The Council's estimate comprised the following steps:
 - 26 minutes to extract spreadsheet of freehold and leasehold sales data from GIS, which includes five minutes to write an SQL query for freehold data, 15 minutes to write an SQL query for leasehold data, two minutes per SQL query for the computer to process the results, and one minute to print out each list;
 - 15 hours to compile a list of elected and ex-elected members of the Council since 1979 using information contained in 'Year books', which includes 30 year books at 30 minutes per book;
 - 1 hour and 20 minutes to compile a list of officers and ex-officers of the Council since 2002, which includes one hour to write a report and 20 minutes to print the results;
 - 375 hours to compile a list of officers and ex-officers of the Council prior to 2002 - based on a current workforce of approximately 4500, and an annual turnover of 15%, the Council estimated that it would take approximately two minutes per paper personnel file to locate, retrieve and extract the names and addresses in relation to approximately 11250 files in total;
 - 44040 hours to cross-reference sales data with names of elected members, ex-elected members, officers and ex-officers – based on a calculation of one second to cross-reference one name against 13229 sales, multiplied by 12000 names (11250 names of officers and ex-officers plus 750 names of elected members and ex-elected members).
29. The Council also stated that it considered the process to be flawed because of the likelihood that some purchasers will be members of the general public who share the same name as members, ex-members, officers and ex-officers of the Council.
30. The Commissioner did not agree with the estimated time required to list the names of elected members and ex-elected members of Council from the Year Books. The Commissioner considered 20 minutes to be a more reasonable figure. The Council agreed with this suggestion.

31. In reference to the Council's estimated time for cross-referencing the sales data spreadsheet with names spreadsheet, the Commissioner considered that the Council may be able sort each list alphabetically prior to cross-referencing. In doing so, the Council would not have to cross-reference each officer and ex-officer name with each individual sale, but could simply search for matching names. The Council disagreed with this suggestion on the basis that the sales data cannot be sorted alphabetically because 'some joint purchasers do not share the same surname'. The Commissioner has not pursued his suggestion further as he does not feel that the time taken to cross-reference the sales data spreadsheet with the names spreadsheet could be in any way sufficiently reduced so as to fall within the appropriate limit.
32. The Commissioner is not satisfied that all elements of the Council's estimate for locating, retrieving and extracting the information requested in relation to properties sold under the Right to Buy are reasonable. However, the Commissioner does accept that any suggested changes would not be sufficient to allow a response to be provided to questions one, two and three within the appropriate limit of 18 hours' work, whether responded to individually or jointly.

Properties sold outside Right to Buy scheme

33. In its refusal notice on 31 July 2008, the Council estimated that complying with questions one, two and three individually in relation to properties sold outside the Right to Buy scheme would take more than 400 hours, and, therefore, would also exceed the appropriate limit. The Commissioner requested further representations from the Council in relation to this estimate.
34. The Council stated that its AMS system "holds a record of 400 properties/land, outside of the Right to Buy scheme, which has been put up for disposal but not necessarily sold, back to 1997". The Council stated that after obtaining a list of sales from the AMS system, it would then need to consult individual archived files to obtain the name, price and date of each individual sale. The Council confirmed that the AMS system does not hold the names of purchasers - the Commissioner viewed a sample from the AMS system, and is satisfied that the sample does not contain the names of purchasers. The Commissioner also noted the Council's suggestion that the figures contained on the AMS system are initial valuations rather than sale completion prices.
35. Having previously tested the time taken to obtain files in relation to properties sold outside the Right to Buy scheme, the Council estimated that it would take between 10 minutes and 90 minutes to obtain each individual file from archive storage in the Modern Records Department of the Civic Offices. The Council stated that this estimation relates to the time required to locate and retrieve the information, but does not include the time required to extract the relevant names, prices and dates of sale. The Council estimated that it would take approximately 60 minutes per individual file, and, therefore, 400 hours in total to comply with questions one, two and three of the request.
36. The Council advised the Commissioner that it does not hold a record of properties sold outside the Right to Buy Scheme prior to 1997. However, on the basis of the

evidence provided in relation properties sold outside the scheme since 1997, the Commissioner is satisfied that the time required to obtain the information requested in questions one, two and three would exceed the appropriate limit individually and jointly, and that inclusion of an estimate relating to sales prior to 1997 would only increase the margin by which the appropriate limit is exceeded.

Question four

37. During the Commissioner's investigation, the Council determined that it could provide information in relation to question four within the cost limit.
38. The Council indicated that it was able to provide information in relation to elected members only, as it had no reason to hold this information in relation to officers or ex-officers of the Council. After conducting searches, the Council confirmed that it held the name and address of one Councillor in relation to question four. The Council concluded this was the only information held in relation to question four through the following steps:
39. The Council advised that it maintains a Register of Interests in relation to elected members of the Council. The Register of Interests includes details of any properties in which elected members hold an interest. The Council advised the Commissioner that the Register of Interests is currently held from 2006 onwards. The Council confirmed that the Registers of Interests predating 2006 have been destroyed in line with document retention schedules.
40. The Council advised that it cross-referenced a list of the names and declared interests of serving Councillors between 2006 and 2008 with the results obtained from the GIS system. The Council confirmed that one positive result was obtained from this exercise. However, the Council advised the Commissioner that it would withhold this information under section 40(2) of the Act. The Council also acknowledged that the withheld information could also be considered to meet the information requested in questions one, two and three.
41. The Commissioner is satisfied that the Council demonstrated how it determined that the one result was the only information held in relation to question four. The Commissioner accepts that the Council is unable to conduct the exercise outlined at paragraphs 38 to 40 where the Registers of Interest have been destroyed, and is unaware of any other way in which the information could be obtained. The Commissioner also notes that the Council does not hold a similar Register of Interest in relation to officers of the Council which could be used in responding to this element of question four.
42. The Commissioner has investigated the Council's application of section 40(2) of the Act in relation to the Councillor's name and address at paragraphs 54 to 80 of this notice.

Question five

43. As the information requested in question five relates to 'pending' purchases, the Commissioner considers that the timing of the request is essential to locating,

retrieving and extracting the information requested. The Commissioner is also mindful that the Act relates to information held at the time of a request.

44. The Council initially considered that the cost of complying with question five individually would exceed the appropriate limit. As outlined in paragraph 12 of this notice, during the course of the Commissioner's investigation the Council determined that it no longer held information in relation to question five, as pending sales would have converted to actual sales. However, using figures which the Council considered typical of the information held at the time of the request, the Council maintained that the cost of complying with question five at the time of the request would have exceeded the appropriate limit. The Commissioner acknowledges both that the information may no longer be held, and the difficulty of using 'typical' figures rather than actual figures for estimating the cost of complying with question five; however, in the interests of conducting a thorough investigation, the Commissioner has investigated the Council's estimate.
45. The Council stated that it no longer holds records of pending sales at the time of the request in 2008, and, as such, it is unable to provide a definite estimate in relation to pending sales at the time of the request. However, the Council has provided an estimate which it considers to be 'typical' of the number of pending sales at the time of the request. As with questions one, two and three, the Council has indicated that information is held in response to question five in relation to properties sold under the Right to Buy scheme, and properties sold outside the Right to Buy scheme.
46. In reference to properties sold under the Right to Buy scheme, the Council advised that a list of pending purchases could be produced by the Leasehold and Commercial Services department. The Council estimated that production of this list would take approximately 10 minutes. The Council based its calculation on 28 pending sales, which it suggests is a typical figure. The Council suggested that it would take over 87 hours to cross-reference the 28 pending purchases with the 11250 names of officers and ex-officers referred to in paragraph 27. The Council has reached this figure by suggesting that, at one second per name, it would take over 3 hours to check all names per pending purchase. This would need to be done 28 times.
47. In relation to properties sold outside the Right to Buy scheme, the Council advised that the Legal Services department are able to interrogate their Time Recording database to produce a list of pending sales. The Council advised that there were no pending purchases on which it could base an estimate.
48. In relation to pending sales under and outside the Right to Buy scheme, the Council advised that the data only relates to applications and does not confirm whether the applications proceed to completion.
49. In the event that the Council held the information requested in question five, the Commissioner notes that this information would not satisfy the complainant's request as it would relate to applications for purchase of properties, rather than actual purchases.

50. Although the Commissioner accepts that the Council initially failed to respond to question five adequately, he is satisfied that the cost of complying with question five at the time of the request would have exceeded the appropriate limit.

Conclusion

51. The Commissioner is satisfied that the Council has demonstrated that the same procedure would be used for complying with each of questions one, two and three. As such, the Commissioner acknowledges that responding to each request individually would, in itself, exceed the appropriate limit. However, the Commissioner considers that, as the Council would be required to undertake the same procedure three times, the Council could feasibly have informed the complainant that the cost of complying with questions one, two and three together would have exceeded the cost limit. In any event, the Commissioner is satisfied that the cost of complying with questions one, two, three and five individually or collectively would exceed the appropriate limit. In reaching this conclusion, the Commissioner considered the time it would take locate, retrieve and extract the information requested.
52. The Commissioner also noted that any response which the Council could provide would not fully satisfy the request for the following reasons:
- As outlined at paragraph 27, the Council did not hold personnel files in relation to officers and ex-officers prior to 1999;
 - As outlined at paragraph 39, the Council did not hold Registers of Interest prior to 2006;
 - As outlined at paragraph 47, the Council did not necessarily hold full details of pending purchases at the time of the request;

Exemptions

Section 40(2) – Third party personal information

53. The full text of the legislation referred to can be found in the Legal Annex at the end of this Notice.
54. As outlined at paragraph 8 of this notice, the Council determined that it could provide information in relation to question four of the complainant's request within the appropriate limit. However, the Council considered this information to be exempt under section 40(2) of the Act.
55. Subject to the provisions of the DPA, section 40(2) of the Act provides an exemption to the duty to disclose information where the information requested constitutes the personal data of a third party, and where disclosure would breach one of the principles contained within the DPA. Section 40(2) is an absolute exemption and, therefore, there is no requirement to undertake a public interest test under section 2 of the Act.

Is the information personal data?

56. In considering whether the Council has correctly applied section 40(2) of the Act, the Commissioner has first considered whether the information requested can be considered to be 'personal data'.

57. The Council considers that the name and address of a particular Councillor who purchased a property from the Council between 2006 and 2008 to be the personal data of this individual.

58. According to section 1(1) of the DPA, personal data can be defined as follows:

"'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."

59. In considering whether the information requested is 'personal data', the Commissioner has also taken into account his own guidance on the issue³.

60. The Commissioner is satisfied that the name of the individual in question can be considered to be personal data. This is because an individual can be identified from this data.

61. The Commissioner is also satisfied that the address of the property purchased by this individual can be considered to be personal data. The Commissioner considers that there will often be circumstances in which individuals can be identified from this and other related information – for example, from the Electoral Roll.

62. The Commissioner is also mindful of the Information Tribunal views in appeal number EA/2006/0060 and 0066⁴, in which the Tribunal stated that "knowing the address of a property makes it likely that the identity of the owner will be found [paragraph 94]". The Tribunal also stated:

"It is the Tribunal's conclusion that the addresses are personal data in the hands of the Council because the addresses are held with ownership details from the Council Tax register. The addresses alone, in our view, also amounts to personal data because of the likelihood of identification of the owner (or the individual who inherits from a deceased owner), as we have concluded above. In our view this information amounts to personal data because it says various things about the owner. It says that they are the owner of the property and therefore potentially have a substantial asset...The key point is that it says something about somebody's private life and is biographically significant" [paragraph 98].

³http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guide_s/personal_data_flowchart_v1_with_preface001.pdf

⁴<http://www.informationtribunal.gov.uk/DBFiles/Decision/i146/ENgland.pdf> - England & Bexley & Information Commissioner

Would disclosure contravene any of the principles of the DPA?

63. The Council stated that it considers disclosure of the information requested would breach the first and second principles of the DPA. As outlined in the Commissioner's guidance on section 40(2) of the Act⁵, the Commissioner considers it is likely only the first principle will be relevant when considering disclosure under the Act. The Council's arguments in respect of the first principle are considered at paragraphs 64 to 73.
64. The Council also stated that disclosure would breach the second principle, which states that "personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes". However, the Commissioner considers that a disclosure under the Act that complies with the DPA in other respects will not breach the second principle. The Commissioner does not consider the disclosure of personal data in response to an FOI request to be a specific purpose for which such information is processed. In responding to an FOI request a public authority is not fulfilling one of its business purposes; it is simply complying with a legal obligation.
65. The Commissioner is of the view it would be difficult to argue that, as a rule, compliance with a legal obligation, such as that imposed by the Act, would be incompatible with the other purposes for which personal data may be processed. Therefore, the Commissioner rejects the argument that a disclosure in response to an FOI request would, in itself, breach the second data protection principle.
66. The Commissioner has therefore considered whether disclosure under the Act would comply with the first principle.

First Data Protection Principle

67. The first data protection principle states:

"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."

Schedules 2 and 3 to the DPA set out conditions under which personal data may be processed, such as the consent of the data subject, and the legitimate interests of the data controller.

68. In this case the Commissioner does not consider the withheld information to constitute sensitive personal data.

⁵http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

Would disclosure of the information be unfair?

69. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner's approach is generally to balance the consequences of any disclosure and the reasonable expectations of the individual concerned with legitimate interest and general principles of accountability and transparency.
70. The Council stated that it did not consider the individual in question would have a reasonable expectation that their name, address and confirmation that their property was purchased from the Council would be disclosed. The Council acknowledged that the individual in question performed a public function at the time of the purchase, but the Council does not consider the individual's decision to purchase a property from the Council related to their public role. The Council stated that such a decision related to the individual's private life. The Council also stated that it had not received consent to disclose this information from the individual in question.
71. The complainant has stated that he considers all parts of his request to relate to "important public information", and indicates that the sale of Council properties to the groups referred to in his request to be a potentially significant issue.
72. The Commissioner acknowledges that the individual was charged with carrying out a public function as a Councillor at the time of the purchase. In this sense, the Commissioner considers that such individuals should have an expectation that their public actions to be scrutinised to a greater degree than those who do not carry out such public functions.
73. However, in this case, the Commissioner does not consider that confirmation of the name and address of an individual who purchased a property from the Council relates to their public functions as a Councillor. In reaching this view, the Commissioner noted that the withheld information in question relates to a property sold under the Right to Buy scheme. The Commissioner noted that any prospective buyer of a property under this scheme must first meet certain eligibility criteria, which does not include occupation – for example, whether they are a Councillor.
74. The Commissioner considers that the requirement to meet such eligibility criteria, regardless of an individual's occupation, reduces the significance of arguments concerning transparency and accountability – the eligibility criteria is the measurement of an individual's suitability to purchase a property from the Council, not the fact that the individual may be a Councillor. Therefore, in this case, the Commissioner is of the view that the individual's occupation is coincidental and that there is a clear distinction between their reasonable expectations as a purchaser of property under the Right to Buy scheme and their reasonable expectations as a Councillor.
75. The Commissioner considers that the individual in question shares the same expectations as any other member of the general public, and the Commissioner

accepts the Council's view that any individual who purchased a property under the Right to Buy scheme would not expect confirmation of this fact to be disclosed.

76. In considering the consequences of disclosure, even though disclosure would inform the general public that an individual who met the eligibility criteria to purchase a property from the Council was also a Councillor, the Commissioner considers that any such disclosure would cause an unwarranted interference to that individual's privacy.
77. The Commissioner also recognises that there are legitimate interests in the public being informed as to the actions of those in the public eye such as Councillors, however he considers that the presence of eligibility criteria which assesses those eligible to purchase properties from the Council serves to mitigate any perceived risk in this situation.
78. The Commissioner therefore considers that disclosure of the name and address of the individual in question would be unfair, and would breach the first Data Protection principle. Therefore, the Commissioner considers that the Council correctly withheld the information under section 40(2) of the Act.
79. The Commissioner further considers that the totality of the request is likely to cover more personal information than just that identified in question 4, even though the Council has not suggested this. However he has not considered this aspect any further as he considers section 12(1) provides sufficient exemption from disclosure in this case.

Procedural Requirements

Section 16 – duty to provide advice and assistance

80. Section 16(1) of the Act requires a public authority to provide reasonable advice and assistance to applicants. Section 16(2) outlines that any public authority which conforms with the Code of Practice issued under section 45 of the Act, is to be taken to comply with the duty imposed by section 16(1).
81. The Code of Practice outlines that, where an authority is not obliged to comply with a request for information because the cost of complying would exceed the "appropriate limit" (i.e. cost threshold), the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower or no fee.
82. In the Information Tribunal case of Barber v The Information Commissioner (EA2005/0004) the Tribunal stated that it will generally be appropriate for the Commissioner to consider whether it was reasonable to expect a public authority to have provided more advice and assistance and, if had it done so, whether this might have had an impact upon how the request was handled.

83. Although the Council informed the Commissioner during his investigation that it was not aware of any way in which the request could be refined so that the appropriate limit would not be exceeded, the Commissioner is not aware that the Council approached the complainant with this view. Whilst the Commissioner accepts that the Council was unable to determine any way in which the request could be refined, this does not mean that the complainant would not have been able to do so had he been informed of the detailed estimate.
84. As such, the Commissioner finds that the Council failed to conform to the Code of Practice, and, therefore breached section 16(1) of the Act.

Section 17 – refusal of request

85. The Commissioner notes that the Council's notice on 31 July 2008 did not specifically state its reliance on section 12(1) of the Act. As such, the Commissioner finds that the Council breached section 17(5) of the Act.

The Decision

86. The Commissioner has decided that the public authority correctly applied section 12(1) of the Act in relation to questions one, two, three and five.
87. The Commissioner has also decided that the public authority correctly applied section 40(2) of the Act in relation to the information held in relation to question four of the request.
88. However, the Commissioner has decided that the public authority breached the following sections of the Act in its handling of the request:
- section 16(1)
 - section 17(5).

Steps Required

89. The Commissioner required the public authority to take the following step to ensure compliance with the Act:
- Provide the complainant with an indication of what information could be provided within the appropriate limit in relation to questions one, two and three, to enable the complainant to refine his request.
90. The public authority must take the step required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

91. Failure to comply with the step described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

92. In relation to the Council's internal review, paragraph 39 of the section 45 Code of Practice encourages authorities to '...provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue'.
93. The outcome of the review in this case, as communicated to the complainant, was very limited and did not demonstrate that a full reconsideration of the factors had taken place. The Commissioner, therefore, advises that the public authority ensures that future internal reviews are carried out in accordance with the guidelines in the section 45 Code of Practice and communicated in full.

Right of Appeal

94. 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.
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 25th day of March 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 12 - Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Section 16 - Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Section 16(2) provides that –

“Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case”.

Section 17 - Refusal of Request

Section 17(1) provides that -

“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.”

Section 17(5) provides that –

“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.”

Section 40 - 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).”

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

“data” means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“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,
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, erasure or destruction of the information or data

Schedule 1

The first data protection principle

“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.”

The second data protection principle

“Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.”

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data:

- “1. The data subject has given his consent to the processing.
2. The processing is necessary-
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary-
 - (a) for the administration of justice,

- (b) for the exercise of any functions conferred on any person by or under any enactment,
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. - (1) 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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.”