

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 17 March 2011

**Public Authority:** Rochdale Metropolitan Borough Council  
**Address:** PO Box 39  
Municipal Offices  
Smith Street  
Rochdale  
OL16 1LQ

### Summary

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The complainant requested information from Rochdale Borough Council (the Council) relating to the employment of a named social worker. The Council withheld some of this information on the grounds that section 40(2) of the Act applied; in that the information requested constituted the social worker's personal data and to release it would be unfair to him. The Council refused the remaining information by virtue of section 40(5)(b)(i) in that it neither confirmed or denied if it held the requested information. The Commissioner is satisfied that the Council was correct to apply section 40(5)(b)(i) in this case; however, the Commissioner also finds that it would not be unfair to release the information withheld by virtue of section 40(2). Therefore the Commissioner requires the Council to provide the complainant with the information withheld at parts 2 and 3 of her request within 35 calendar days.

### 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 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 5 January 2010 the complainant submitted a request to Rochdale Borough Council (the Council), her request was as follows:

*"I would like to request the following information:*

*1) Did [name redacted] work for Rochdale Council as a duty social care worker in the child care department of social services?*

*2) If so, when did [name redacted] start working in the social services department for Rochdale Council?*

*3) When did [name redacted] stop working for the social services department at Rochdale Council?*

*4) Was [name redacted] dismissed from his position following complaints from parents.....[redacted].....?*

*5) How many complaints of the above nature (see question 4) were received regarding [name redacted]?*

*6) Did the council conduct a CRB check on [name redacted] before employing him in the social services department of Rochdale Council?*

*7) Was [name redacted] employed in the children's department of social services at Rochdale Council?*

*8) If so, what was [name redacted] job title at Rochdale Council?*

*9) When did [name redacted] start working for Rochdale Council?*

*10) Was [name redacted] dismissed from Rochdale Council?*

*11) If so, when was [name redacted] dismissed from Rochdale Council?*

*12) Was [name redacted] dismissal related to [name redacted]'s dismissal?"*

3. The Council provided a response on 9 February 2010 in which it provided information for parts one, six and seven, refused parts two, three, four and five on the basis of the exemption contained at section 40, and stated that it did not hold any information regarding parts eight to twelve as these questions related to an agency worker and therefore any relevant information would be held by the agency in question.

4. The complainant requested an internal review of the Council's decision on 1 April 2010.
5. The complainant contacted the Commissioner on 27 April 2010 to complain that the Council had failed to carry out the requested internal review.
6. In an email dated 15 June 2010 the Commissioner wrote to the Council asking it to respond to the internal review within 20 working days.
7. On 9 August 2010 the Council wrote to the complainant with the result of the internal review it had carried out. The Council upheld its decision to refuse disclosure of requests 2 and 3 by virtue of the exemption contained in section 40(2) – third party personal data and refused requests 4 and 5 by virtue of the exemption contained at section 40(5)(b)(i) – neither confirm nor deny. The Council provided information for requests 8 and 9 in relation to the agency worker.

## The Investigation

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### Scope of the case

8. On 31 July 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The Council's application of S40 to requests 2 to 5
  - The Council's failure to carry out an internal review

The complainant did not complain about the remaining parts of her request (1, 6, 7, 8, 9, 10, 11 and 12), so the Commissioner has not considered them.

### Chronology

9. The Commissioner wrote to the Council on 10 August 2010 advising it that the case was being taken forward. He asked it to provide its arguments for withholding the information, along with a copy of the withheld information.
10. On 27 September 2010 the Council contacted the Commissioner to ask if this case had been closed upon the Council's completion of the internal review.

11. The Commissioner wrote to the Council on 18 October 2010 stating that the complaint remained open and again requesting that the Council provide the Commissioner with the withheld information.
12. The Council responded to the Commissioner in an email dated 1 November 2010. In this email the Council provided copies of the communication which had taken place between it and the complainant. It did not however provide the Commissioner with the withheld information.
13. In an email to the Council dated 3 November 2010 the Commissioner again asked for the withheld information to be supplied to him.
14. The Council supplied the withheld information to the Commissioner in an email dated 14 November 2010.

## **Analysis**

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### **Exemptions**

15. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.
16. In considering whether the exemption is valid, the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public.

### **Exemption: Section 40(2)**

#### **Requests 1 and 2**

When did [name redacted] start working in the social services department for Rochdale Council?

When did [name redacted] stop working for the social services department at Rochdale Council?

17. Section 40(2) provides an exemption for information which is the personal data of a third party. Section 40(2) is contingent on two conditions and the Council has informed the Commissioner that it is withholding the recorded information under section 40(2) by virtue of section 40(3)(a)(i) of the Act. This condition requires firstly for the

information to be personal information under the DPA and secondly that the disclosure of it would contravene a data protection principle.

*Is the information about an employment start date 'personal data'?*

18. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as:

*'...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 intention of the data controller or any other person in respect of the individual.'*

19. The Commissioner has viewed the information that was requested and is satisfied that the information relates to an identifiable living individual, in this case a named social worker. The Commissioner accepts that information about an individual's contract with their employer is the individual's personal data as defined by the DPA.

*Does the disclosure of the information contravene any of data protection principles?*

20. Having concluded that the information falls within the definition of 'personal data', the Commissioner must then consider whether disclosure of the information breaches any of the eight data protection principles as set out in schedule 1 of the DPA.
21. In this case the Council has informed the Commissioner that it is the first data protection principle that it believes would be contravened by releasing the withheld information.

### **The First Principle**

22. The first data protection principle requires that the processing of personal data should be fair and lawful and that at least one of the conditions in Schedule 2 of the DPA must be met. The term 'processing' has a wide definition and includes disclosure of the information under the Act to a third party.

*Would it be fair to disclose the requested information?*

23. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The individual's reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
  - Whether disclosure would cause any unnecessary or unjustified damage to the individual and whether the individual has refused to consent to disclosure.

*Reasonable expectations of the data subject*

24. The Council stated that the information was held for the purposes of Council business and to enable it to carry out its functions. Disclosure of the withheld information would be unfair, would cause unwarranted harm and undermine confidence and trust in the Council's ability to process personal data. It informed the Commissioner that it believed the release of the withheld information would be unfair to the data subject, and that it did not think that the data subject would have had a reasonable expectation of the withheld information being released in this case. Instead, there was an expectation of confidentiality and privacy. The Commissioner, having considered the withheld information, is not convinced that the reasonable expectations of the social worker in question are a persuasive factor in indicating that the release of this information would be unfair.
25. The Information Commissioner's Office has produced Awareness Guidance on section 40 of the Act, which makes it clear that public authorities should take into account the seniority of employees when personal information about their staff is requested under the Act. However, the Commissioner also considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information relates to an employee's professional life, and not their personal life.
26. The Commissioner's guidance "The Exemption for Personal Information" (version 3 11 November 2008) on the application of 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:

*“Whether the information relates to the individual’s public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances). Information about an individual’s private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position, and whether they have a public-facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official’s public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (e.g. the official’s family).”*

### *Consequences of the disclosure on the data subject*

27. In this instance the Commissioner cannot identify any specific harm in releasing the information requested about employment dates in this case, and he considers that the release of the requested information would be fair. He considers that – given the benefits of transparency and accountability - a legitimate interest arises from the disclosure on request of information by public bodies.
28. He also finds, in relation to of these requests, that there would be no unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the social worker concerned. The Commissioner does not uphold the Council’s refusal of these requests in relation to the date a named social worker commenced and ceased employment with the Council.

### **Section 40(5)(b)(i)**

#### **Requests 4 and 5**

When did [name redacted] stop working for the social services department at Rochdale Council?

Was [name redacted] dismissed from his position following complaints from parents.....[redacted].....?

29. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
- constitute a disclosure of personal data; and
  - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998.



30. The Commissioner's analysis of whether the above criteria would be fulfilled follows.

*Would confirming or denying whether information is held reveal personal data of the data subject?*

31. The complainant has requested information relating to a complaint about a named social worker.
32. The Commissioner considers that confirming or denying whether the information is held or not would constitute a disclosure of personal data. Confirming or denying would inevitably disclose whether or not a complaint was made. As this information clearly relates to an identifiable individual, the Commissioner accepts that this information would constitute personal data.

*Would disclosure of this personal data be unfair and in breach of the first data protection principle?*

33. The first data protection principle states that:
- “Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met...”
34. When assessing whether it would be fair to process personal data, it is important to consider the data subject's expectation of disclosure. The Commissioner would consider it reasonable that a social worker would have an expectation that information which reveals whether or not they have been the subject of any complaints would not be disclosed widely under the Act.
35. The Commissioner makes a clear distinction when issuing decisions about requests for information relating to professional matters and information relating to an individual outside their professional capacity. The Commissioner's policy has been that he considers it more likely that disclosure of personal data would be unfair where the information relates to an individual's private matters than if it relates to their professional capacity. In this case, the information relates to an individual in a professional capacity and their interests are the first consideration when determining whether confirming or denying that information is held would be fair.
36. Disclosing whether or not an individual is the subject of a complaint would reveal information relating to their performance at work.



37. The Commissioner's conclusion is that confirming or denying whether the requested information is held would constitute an unfair disclosure of personal data. Therefore, the exclusion from the duty to confirm or deny provided by section 40(5)(b)(i) is engaged.
38. In making this decision the Commissioner has first concluded that confirming or denying if the requested information is held would constitute a disclosure of personal data. It is clear that such information, if held, would be information which is linked to an identifiable individual. Secondly, the Commissioner concludes that the disclosure of personal data of this type, if held, would be unfair and would therefore be in breach of the first data protection principle. The Commissioner has taken into account the nature of the requested information, the fact that confirming or denying if the requested information was held, would reveal information relating to an individual's performance at work; about which they would have an expectation of non-disclosure, and that there is no overriding reason to confirm or deny the existence of such information.

## **Procedural Requirements**

### **Section 1**

39. Section 1(1) of the Act states that:

*"Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and  
(b) if that is the case, to have that information communicated to him."*

40. The Commissioner has considered whether the Council has complied with section 1(1)(a) and (b) of the Act.
41. The Commissioner considers that the Council has breached sections 1(1)(a) and 1(1)(b) of the Act as it failed to confirm or deny that it held the information at requests 2 and 3, and failed provide information to the complainant within the statutory time for compliance.

### **Section 10**

42. Section 10(1) of the Act states that:

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

43. The Commissioner considers that the Council has breached section 10(1) of the Act as it failed to respond to requests 2 and 3 within twenty working days following the date of receipt.
44. The failure of the Council to carry out an internal review within 20 working days is addressed in the "Other Matters" section below.

## **The Decision**

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45. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the Act:
  - The Council correctly refused requests 4 and 5.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The Council incorrectly withheld the information requested at 2 and 3.
- The Council breached section 10(1) of the Act in failing to comply with sections 1(1)(a) and 1(1)(b) within twenty working days following receipt of the requests 2 and 3.

## **Steps Required**

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46. The Commissioner requires the Council to take the following steps to ensure compliance with the Act:
  - Provide the complainant with the information requested at 2 and 3 of her request
47. The Council must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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48. Failure to comply with the steps 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

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49. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

## Right of Appeal

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50. 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)

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 17<sup>th</sup> day of March 2011**

**Signed .....**

**Andrew White  
Group Manager**

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

## Legal Annex

### Personal information.

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**Section 40(5)** provides that –  
“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;  
"data subject" has the same meaning as in section 1(1) of that Act;  
"personal data" has the same meaning as in section 1(1) of that Act.