

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 November 2011

Public Authority: East Hertfordshire District Council
Address: Wallfields
Pegs Lane
Hertford
SG13 8EQ

Summary

The complainant asked the council to provide copies of any application forms or questionnaires that had been submitted by candidates for the East Hertfordshire Independent Remuneration Panel since April 2010, redacted as appropriate. The council initially refused to provide any of the information on the basis that it was exempt under section 40(2) of the Freedom of Information Act 2000 ("the FOIA"). During the investigation, the council agreed to disclose five of the responses on the basis that the individuals concerned had consented to the disclosure, with the exception of a signature on one of them. However, it still wished to withhold four responses in their entirety. The Commissioner decided that the exemption was properly applied to withhold the signature and some information in the remaining four responses however he considered that the council had incorrectly applied the exemption to other information within the responses. The Commissioner requires the council to disclose the information in the confidential annexes A and B attached to this notice. The annexes have been issued to the council only and not to the complainant as they contain withheld information. He has ordered the disclosure of that information within 35 days. He found breaches of section 10(1), 1(1)(b), 17(1) and 17(1)(c).

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 FOIA. This Notice sets out his decision.

Background

2. The Independent Remuneration Panel ("the IRP") has been established in accordance with the Local Authorities (Members Allowances) (England) Regulations 2003 to provide the authority with advice on its Members' allowance scheme and on the amounts to be paid. The role of the IRP is to consider and advise the council on the following allowances payable to elected members:
 - Basic Allowances
 - Special Responsibility Allowances
 - Childcare and Dependent carer's Allowances
 - Travel and Subsistence Allowances
3. IRP members are appointed by the council at a full council meeting. Candidates should be assessed using the criteria detailed in guidance issued by the Department for Communities and Local Government entitled "Guidance on members' allowances for local authorities in England".¹
4. IRP Members are appointed for a 2 year term and meet for a minimum of once per year. The reports of the panel are published and made publicly available in accordance with statutory requirements and government guidelines. IRP members are paid an allowance for carrying out their duties.
5. At its Annual meeting on 12 May 2010, the council considered options for constituting the council's IRP. The council agreed that suitable candidates should be identified from the following categories:
 - Former East Hertfordshire District Councillors
 - The East Hertfordshire business community
 - Other public sector bodies with a presence in the area
 - Existing or former members of the IRP of other local authorities
 - Members of East Hertfordshire town/parish councils (excluding anyone who is also a Member of a Principal Authority).
6. To assist the council in ensuring that the panel is independent and open minded, reasonably knowledgeable about local government and representative of a range of backgrounds and experiences, potential

¹ <http://www.communities.gov.uk/documents/localgovernment/pdf/153902.pdf>

candidates were sent a questionnaire which can be found on the last pages of the following report in the public domain.²

7. Responses were received from 9 candidates and all of the candidates were appointed. The responses received were copied to all of the council's elected members. The council advised the candidates that it did not intend to publish the information however it highlighted that the council may be required to supply redacted copies of the responses if the event of a Freedom of Information request.
8. The council has published on its website some information about the process of appointing the panel members and it has confirmed the names of those appointed. It has not published the responses submitted by the candidates. The information available on the website provides limited information about the background of the appointed candidates such as whether they are former councillors etc.

The Request

9. On 28 September 2010, the complainant requested information from the council in the following terms:

"Under the provisions of the Freedom of Information Act could you please send me copies of any and all application forms/questionnaires submitted by candidates for the East Herts Independent Remuneration Panel since April 2010 redacted as appropriate?"

10. The council replied on 4 November 2010. It stated that it could not disclose the requested information as it was exempt under the FOIA. It cited section 40 of the FOIA and said that it believed that disclosure would breach the Data Protection Act 1998 ("the DPA").
11. The complainant wrote to the council on 10 November 2010 to request an internal review. He said that he was not persuaded that section 40 was engaged and he noted that the council had not considered whether redacted information could be disclosed.
12. The council completed its internal review on 3 February 2011. It said that it had taken into account the views of the individuals who supplied the information and wished to maintain its position that the information was exempt.

² <http://e-services.eastherts.gov.uk/moderngov/mgConvert2PDF.aspx?ID=3141>

The Investigation

Scope of the case

13. On 4 February 2011, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the council had correctly refused to provide him with the information he had requested.
14. During the course of the Commissioner's investigation, the complainant specifically confirmed that he did not wish to receive copies of the "monitoring forms" that formed part of the questionnaire.
15. The council also agreed to disclose five of the responses as it considered that the individuals concerned had consented to the disclosure. This is with the exception of a signature. The Commissioner considers that the complaint about the disclosed information was informally resolved by the disclosure and he has not therefore addressed this in the Decision Notice.
16. For clarity, the Commissioner's decision below is concerned with the withheld signature and information withheld from the four remaining responses. Any information that is already publicly available has been scoped out of the investigation.

Chronology

17. On 9 March 2011, the Commissioner sent a standard letter to the council to ask for information to help him to consider the complaint.
18. The council replied on 23 March 2011. It provided copies of the withheld information and copies of the responses that it had received from the individuals concerned following its consultation on whether or not the information could be disclosed. The responses indicated that not all panel members had refused to consent to the disclosure.
19. On 6 April 2011, the Commissioner wrote to the complainant to set out his understanding of the request and the complaint.
20. The complainant replied on the same day and confirmed that the Commissioner had correctly understood his request and complaint.
21. On 7 April 2011, the Commissioner wrote to the council. The Commissioner invited further arguments from the council about its decision to apply the exemption. In particular, the Commissioner asked the council to explain why the disclosure would be unfair. He also

pointed out that a lack of consent was not the only relevant factor to consider. Furthermore, it was apparent from the evidence that not all of the panel members had refused to consent. The Commissioner also asked the council to consider disclosing a redacted version of the information. The Commissioner explained that his position is that if information is truly anonymous, it will no longer be personal data.

22. The council sent its full response on 11 May 2011. It said that having reviewed the matter, it had decided to disclose some of the responses where those members had consented to the disclosure, however it wished to redact a small amount of information using section 40(2), comprising of the names of individuals. It stated that it wished to withhold three responses in their entirety because those individuals had not consented to public disclosure. The council explained that it was of the view that there was no public interest in the disclosure. The council stated that it was aware that the FOIA is applicant blind however it then suggested that it had taken into account the requester's identify when considering whether unwarranted harm would be caused to the individuals.
23. The Commissioner wrote to the council on 19 May 2011 to ask the council to clarify what information it had made available to the public about the panel members following their appointment.
24. On 24 May 2011, the council supplied links to copies of reports to the council concerning the appointment of the panel members. It said that these reports were publicly available. It said that there had also been some articles in the local press and it provided the Commissioner with copies of these. However, the council said that it had not proactively published any other information about the panel members.
25. On 14 June 2011, the Commissioner wrote to the council and asked it to provide the information to the complainant that it no longer thought should be withheld. It asked the council to consider disclosure of the names that it had redacted from these forms as well in view of the fact that the council believed it had consent to disclose the responses.
26. On 28 June 2011, the council telephoned the Commissioner. During this conversation, it was agreed that the council would disclose five of the responses in their entirety, including the redacted names. The only exception to this was that it was deemed appropriate to continue to withhold the signature of one of the candidates using section 40(2). The council also explained that one of the individuals had also changed their mind and now wished to refuse consent. It said that it would forward the objection to the Commissioner.

27. On the same day, the council wrote to the Commissioner to confirm that it had provided five of the responses directly to the complainant. It also provided a copy of the additional objection.
28. The complainant also wrote to the Commissioner on the same day. He confirmed that he was still not happy with the decision to withhold the remaining information.

Analysis

Exemption – Section 40(2)

Section 40(2) – Third party personal data

29. This exemption provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 2 of the DPA.

Is the withheld information personal data?

30. Personal data is defined by the DPA as any information relating to a living and identifiable individual. Having considered the withheld information in its entirety, the Commissioner was satisfied that it clearly relates to living and identifiable individuals and is personal data in its complete context.
31. However, the Commissioner's view is that where information can be redacted so that it would not be possible to identify the individual to whom the information relates, the remaining information will not constitute personal data. The principles of the DPA do not apply to the disclosure in these circumstances. Having considered the information, the Commissioner's view was that there was clearly some information of such a general nature that the disclosure of that alone would not lead to the identification of a particular person. For example, part of question 1 asks about the candidate's understanding of the role of the council's elected members and how the cabinet system of governance operates in a local council. Many of the comments made when responding to this part of the question will not identify the individual concerned if other information that could identify the individual is redacted. The Commissioner considers that section 40(2) has not been correctly applied to this type of information because it is not personal data when suitable redactions are made. The remainder of the Commissioner's considerations only relate to information that could identify a specific individual.

Would disclosure breach the Data Protection Principles?

32. The Data Protection Principles are set out in Schedule 2 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

33. When the council was asked to explain to the Commissioner why disclosure of the withheld information would have been outside the reasonable expectations of the individuals concerned, the council's response focused on the fact the individuals concerned had not given their consent to the disclosure. The only exception to this was the withheld signature. This individual had consented to the disclosure. However, it seemed likely that the individual had not fully considered the consequences of disclosing the signature and had perhaps not recalled that the document had been signed.
34. Regarding the responses where consent had been refused, the Commissioner explained to the Council that a lack of consent was not in itself sufficient to demonstrate that a disclosure was beyond the reasonable expectations of an individual. Key to this issue is considering what ought to have been within the reasonable expectations of the individuals in the circumstances. An objection to a disclosure will not necessarily be a *reasonable* one.
35. In considering what a person's reasonable expectations were, one factor is to consider what (if anything) was said to the individual about the possibility of disclosure. The Commissioner has seen a copy of the questionnaire that potential panel members were asked to complete. He notes that at the bottom, it states the following:
- "The Council does not intend to publish any information you provide. However, the Council may be required to supply a redacted copy of the statements you make in response to Freedom of Information requests".*
36. The Commissioner considers that the above statement is likely to have contributed to an expectation that, some, though not all of the information may be disclosed. However, whether a disclosure is appropriate or not will be determined by law in accordance with the terms of the FOIA and not by any commitments that a public authority may have given.

37. The Commissioner has noted in this case that the information relates to a role that carries a considerable amount of public responsibility for providing advice on the expenditure of public funds to elected representatives. The Commissioner notes that the panel members in question are not employees of the council and are not currently serving councillors for this particular local authority. However, they are clearly taking on a role with similar responsibilities to elected representatives and which is clearly part of public life. The Commissioner therefore considers that although they are volunteers, they must share the expectations of others in public service to adhere to certain standards of scrutiny that are appropriate to their role (see the Seven Principles of Public Life by the Committee on Standards in Public Life)³. The guidance relating to this particular public role clearly envisages appropriate transparency in the appointments process and that the public should be able to have a high level of confidence in the independence of the panel members. The Commissioner has had regard to the Guidance on members' allowances for local authorities in England issued by the Department for Communities and Local Government which states the following:

"The 2001 Regulations do not specify how a local authority may go about finding members of its remuneration panel. A local authority will need to consider carefully and plan its appointments process having regard to this guidance and the need to ensure that this process commands public confidence throughout all the communities in the local authority's area...In all cases the local authority will need to ensure that its appointment process is open to public scrutiny. A local authority should give very serious consideration not only to ensuring the independence of its independent remuneration panel but also the public perception of this independence".

38. In view of the above, the Commissioner considered that the panel members ought to have expected a higher degree of transparency than is typically involved in a routine recruitment process. The Commissioner has taken account of the fact that the individuals concerned were putting themselves forward voluntarily as suitable candidates to be in a position of trust with considerable responsibilities affecting public money. The nature of the panel places an emphasis on their independence and stresses the importance of the public perceiving them as being independent.

³ http://www.public-standards.gov.uk/About/The_7_Principles.html

39. The Commissioner considered that five of the successful applicants agreed to the disclosure of the responses and that this highlights that the usual confidentiality surrounding application forms in recruitment cannot be directly applied to these circumstances. It indicates awareness that because of the nature of this particular role, a greater level of transparency is appropriate.

Consequences of disclosure

40. In the case of the withheld signature, the harmful consequence is that it increases the potential for fraud.
41. Regarding the remaining withheld information, when the Commissioner asked the council about what harmful consequences the disclosure could have, the council said that although it appreciated that the FOIA is applicant blind, it alleged that the requester has a known history of passing information on to the local press. The council is not permitted to consider the motivation behind the request and the Commissioner has therefore disregarded this argument. Furthermore, any disclosure under the FOIA is considered to be a disclosure to the public in any case, which includes the press. However, the Commissioner has taken into account the possibility envisaged by the council that the information could be used to criticise individual appointments.
42. The Commissioner also considered that there was some possibility that people may be discouraged from applying for such roles in the future if the information was disclosed.
43. Finally, the Commissioner has had regard to the fact that some of the candidates clearly did not envisage all of the information being disclosed the public. Such a disclosure could cause distress.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

44. The Commissioner accepts that disclosure of the withheld signature would be unfair. It seems unlikely that the consequences of that disclosure were properly considered by the individual. In any event, those consequences far outweigh any public interest in the disclosure as it is sufficient for these purposes for the identify of the candidate to be communicated in another way.
45. Regarding the remaining withheld information, the council refused to acknowledge that there was any public interest in the disclosure. As evidence of the lack of public interest, it pointed to the fact that it had not received any other requests for the information. The Commissioner does not accept that the level of requests concerning a particular matter can have any reasonable bearing on the level of public interest

that is inherent in that information. Furthermore, it is a well established general principle that the public interest is different from what the public are interested in.

46. The Commissioner also disagrees that there is no public interest in the disclosure. There is always some public interest in the disclosure of any information that is held by a public authority because this helps to promote the aims of transparency and accountability. There is a strong public interest in this case because the information relates to the background of individuals who have put themselves forward for a role with significant responsibility for advising on public funds. It is also clearly the case that the appointments are designed to generate greater public confidence that the remuneration process will operate fairly and transparently and particular emphasis is placed on the independence of the panel members. The Commissioner was not persuaded that disclosure of at least some of this information would have been beyond the reasonable expectations of the panel members.
47. The Commissioner noted that in his initial complaint to the Commissioner, the complainant particularly highlighted the strong public interest in disclosure of the responses to questions 2 and 5 which deal most pointedly with the issues of independence. For the avoidance of doubt, questions 2 and 5 read as follows:

"Please state your current and past membership of or affiliation to any political party, campaigning organisation or group relevant to the public sector"

"Please provide details of any family, business or social relationship in the last 5 years with any member of East Herts Council"

The Commissioner considered the responses provided to these questions and he decided that the disclosure of some of this information, with the individuals concerned identified, would be fair in view of the responsibilities attached to the role.

48. In relation to the remaining information, the Commissioner's view is that the disclosure would not be fair in the circumstances. The Commissioner recognises that internal scrutiny by the local authority is not the same as public scrutiny and cannot go as far towards satisfying the public interest. However, the Commissioner's view is that in relation to some information, there is a general and widely accepted view that an appropriate degree of confidence is to be placed in the effectiveness of the council's ability to choose appropriate people to fulfil public roles. There is a balance to be struck in most cases to avoid an unwarranted level of intrusion into an individual's private circumstances.

Is the disclosure of the responses to questions 2 and 5 necessary?

49. For clarity, when a disclosure would be fair, the Commissioner must consider whether it would be necessary in accordance with Condition 6 in Schedule 2 of the DPA. The full wording of Condition 6 is as follows:

“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”.

50. The council said that it was not convinced that the disclosure would be necessary due to the lack of public interest in disclosing the information. The Commissioner has already explained that he considers that the council is wrong to state that there is no public interest in the disclosure. Given the council's position, it naturally follows that the amount of information that has been made available to the public about the individual panel members is very limited. In view of this, and the nature of the particular role, the Commissioner considers that disclosure of some of the information in the responses to questions 2 and 5 is necessary.

Procedural Requirements

51. It is the Commissioner's view that if the council had redacted the documents appropriately, some information could have been disclosed to the complainant without identifying the individuals concerned. The Commissioner also considered that some of the information contained in the responses to questions 2 and 5 should have been disclosed to the complainant, along with the identities of those who submitted those responses. He therefore finds that the council breached section 10(1) and 1(1)(b) of the FOIA because of the failure to disclose this information.
52. The Commissioner found a breach of section 17(1) and 17(1)(c) because the council failed to adequately explain why the information was exempt either by the time of its initial response or the date of its internal review. It also failed to respond to the request within the statutory 20 working day deadline which breached section 10(1).

The Decision

53. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the FOIA:

- It correctly withheld information using section 40(2) of the FOIA (other than that described in paragraph 51 of this notice).
54. The Commissioner finds that the following elements of the request were not dealt with in accordance with the FOIA:
- The council should have released the information described in paragraph 51 of this notice because it was not exempt under section 40(2) of the FOIA. This is a breach of section 10(1) and 1(1)(b) of the FOIA.
 - The Council failed to adequately explain to the complainant why the information was exempt and it therefore breached section 17(1) and 17(1)(c).
 - The Council failed to respond to the request within the statutory 20 working day deadline. This was a breach of section 10(1).

Steps Required

55. The Commissioner requires the public authority to take the following steps to ensure compliance with the FOIA:
- Annex A shows the information that can be disclosed without identifying the individuals concerned. The council should disclose Annex A to the complainant.
 - Annex B shows the information that should be disclosed from the responses to questions 2 and 5. The council should disclose Annex B to the complainant as a separate document as demonstrated by the Commissioner.
56. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

57. 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

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

Time taken for internal review

59. The Commissioner's published guidance states that an internal review should not exceed 20 working days unless exceptional circumstances are involved. The Commissioner notes that on this occasion, the council took longer than 20 working days to complete its internal review. The Commissioner trusts that the council will consider the Commissioner's guidance and make appropriate improvements in the future.

Right of Appeal

60. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

61. 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.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled

–

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

Time for Compliance

Section 10(1) provides 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.”

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 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.”