

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 October 2006

Public Authority: City and County of Swansea

Address: County Hall
Oystermouth Road
Swansea
SA1 3SN

Summary

The complainant requested to know the cash pay off figure for a former Chief Executive of the City and County of Swansea who retired in 2002. The public authority refused to disclose the information on the basis that the withheld information was personal information and that disclosure would breach the Data Protection Act. It specified FOIA section 40 as the relevant exemption from its duty to disclose this information. It also applied s.41 of the FOIA in that disclosure would constitute a breach of confidence actionable by the employee. Having examined the personal information caught by the scope of this request, the Commissioner has decided that the public authority has correctly applied FOIA section 40 in the circumstances of this case. In view of the fact that the Commissioner considers the most appropriate exemption in this case to be s.40 he has not considered the application of s.41 in this Decision Notice.

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. The Information Commissioner (the Commissioner) has received a complaint from [name redacted] (the complainant) which states that on 10 February 2005 the following request for information was made to the City and County of Swansea (the public authority) in accordance with section 1 of the Act:

" I would like to have the cash pay off figure when Vivienne Sugar left the previous administration and I would like to know, as general administration, the organisation involved in caring for asylum seekers in Swansea"

3. The subject of the request is the former Chief Executive of the City and Council of Swansea, Vivienne Sugar. Mrs Sugar held this post from 1995 to August 2002 at which point the public authority announced her early retirement.
4. The public authority provided a refusal notice to the complainant as required by section 17 of the Act on 8 March 2005. It refused to provide the requested information about Ms Sugar citing section 40 (personal data) as the basis for its refusal.
5. On 11 March 2005 the complainant requested an internal review of the public authority's decision not to provide the cash pay off figure for Ms Sugar. The public authority replied on 11 April 2005 and maintained its decision to refuse to disclose the information citing section 41 (information provided in confidence) as well as section 40. It stated that in relation to section 41 the public authority owes an implied duty of mutual trust and confidence to its employees and former employees and the authority would be breaching that trust if it gave to the public information on that employee. It also stated that this could give rise to an actionable breach of confidence by the employee. As regards section 40 the authority indicated that the disclosure of personal information could result in a breach of the data protection principles.

The Investigation

Scope of the case

6. On 13 April 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision not to provide the final pay off figure for Ms Sugar. As this was the only complaint made to the Commissioner, he has therefore not addressed the second part of the complainant's request in this Decision Notice.

Chronology

7. **13 June 2005.** The Commissioner wrote to the complainant seeking a copy of his original request and the public authority's refusal notice.
8. **11 July 2005.** The Commissioner wrote to the public authority and asked it to explain in more detail why it believed the information was exempt under section 40 and 41. He also indicated that he may require a copy of the withheld information in order to reach his decision.
9. **31 August 2005.** The public authority replied by explaining that the information was withheld on the basis that it believed disclosure would breach the first data protection principle in the Data Protection Act 1998 (DPA) which requires that

- personal data be processed fairly and lawfully. It explained that the payment to Ms Sugar was subject to an agreement at that time and part of that agreement was that no information was to be released apart from an agreed media statement. It was the intention and expectation of the parties at that time that the information was to be confidential and it would not be released then or in the future. It also attached a copy of the agreement which contained the information requested by the complainant. Furthermore it added that the public authority believed that disclosure of the information would cause unnecessary and unjustified distress and damage to Mrs Sugar. It explained that its decision to apply section 41 was based on its view that the information was contained within a legally binding and confidential compromise agreement with the Authority and to disclose the financial information requested could result in the public authority being subject to legal action by Mrs Sugar.
10. **9 September 2005.** The Commissioner wrote back to the public authority and explained that he was not sufficiently persuaded that disclosure of the information would breach the DPA, bearing in mind the seniority of Ms Sugar, the fact that the request was for professional personal information and that she should expect a greater degree of public scrutiny where public money is being spent. He therefore asked the public authority to revisit its application of section 40 taking into account Mrs Sugar's seniority and to provide further comments on why it believed the information was exempt. He also questioned the application of section 41. Section 41 (1) (a) states that information is exempt information if it was obtained by the public authority from any other person (including another public authority). The Commissioner asked the public authority to clarify why it believed the information was obtained from any other person.
 11. **13 October 2005.** The public authority replied and explained that in view of the legal agreement entered into by the parties, Ms Sugar had a legitimate expectation that the information would not be made public. The public authority believed it would be in breach of that agreement in disclosing the information. It also explained that the sum paid to Ms Sugar represented her pension entitlement under the Local Government Pension Scheme, calculated in accordance with that scheme. It therefore asked the Commissioner to reconsider his view that the sum related purely to her professional duties. As regards section 41, the public authority explained that the information was obtained from the Local Government Pension Scheme and although it is administered by the City and Council of Swansea it is, in its opinion, arguably information obtained from another body.
 12. **14 November 2005.** The Commissioner asked the public authority whether it would consider disclosing a summary explaining how the figure was calculated without revealing the actual amount on the basis that the same principles are applied when dealing with the departure of other senior public officials.
 13. **18 November 2005.** The public authority advised that it was seeking Mrs Sugar's comments before replying to the Commissioner's letter of 14 November 2005.
 14. **7 December 2005.** The public authority replied and advised that information about the Local Government Pension Scheme together with its own policy on

early retirement is publicly available. It also explained that it had taken into account the Local Government Pension Scheme Regulations 1997 (as amended) and in particular Regulation 97 (4) which provides that “where a person is or may become entitled to a benefit payable out of a pension fund, the administering authority maintaining that fund must decide its amount”. It would not however be prepared to disclose more specific information as to the actual amount paid to Ms Sugar.

15. **6 July 2006.** Following internal consideration with the Commissioner's legal department, the Commissioner wrote again to the public authority seeking further information about the amount paid to Ms Sugar. In particular he enquired as to how the council had calculated Ms Sugar's payment, particularly in relation to any discretionary award it had made.
16. **25 August 2006.** The public authority provided a response to the questions raised by the Commissioner. It confirmed that payments in relation to early retirement are provided for in the council's accounts, these payments are also subject to internal and external audit and that each case is considered on its own merits, taking into account the expectations of the individual concerned.

Analysis

17. The Commissioner has considered the public authority's response to the complainant's request for information.

Exemptions

Section 40 – Personal Data

18. The Commissioner is satisfied that the information which identifies the lump sum payment to Ms Sugar does constitute personal data of which she is the data subject. The full text of section 40 is provided in the Legal Annex at the end of this Decision Notice.
19. The public authority argued that the disclosure of Ms Sugar's personal data caught by the scope of this request would contravene the requirements of the first data protection principle of the DPA in that it would constitute unfair processing of her personal data.
20. The first data protection principle has two components
 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
 - (a) at least one of the conditions in the DPA Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in the DPA Schedule 3 is also met

21. Sensitive personal data, such as information about an individual's health, criminal activity (including allegations of criminal activity) or religious beliefs are not part of the requested information in this case. Therefore in considering the first data protection principle, the Commissioner only needs to consider whether one of the conditions in DPA Schedule 2 could be met. The full list of Schedule 2 conditions can be found by accessing the statute via the Office of Public Sector Information website <http://www.opsi.gov.uk/acts/acts1998/80029--n.htm#sch2>
22. The Commissioner considers that the most applicable condition in this case is likely to be Schedule 2 (6) (1) which states
- “The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.*
23. In considering whether disclosure of Ms Sugar's personal data would contravene the requirements of the first data protection principle, the Commissioner has taken a number of factors into consideration.
- The existence of a compromise agreement made between the parties
 - Ms Sugar's reasonable expectations about what would happen to her personal data
 - Ms Sugar's seniority
 - Legitimate interests of the local residents, taxpayers and relevant stakeholders in knowing the amount of public money being spent on severance awards
24. The Commissioner recognises the important role that compromise or termination agreements can play in employer/employee relationships. They avoid the time, expense and stress of litigation in an Employment Tribunal where an employer/employee relationship breaks down. Both parties also have an opportunity to conclude the relationship in private and make a fresh start if they so choose. The Employment Rights Act 1996 (which establishes the opportunity to reach a compromise agreement) has built safeguards into the compromise agreement process to ensure that employees receive independent and accountable legal advice before entering into such agreements.
25. The Commissioner believes that the right to access official information and the right to reach an equitable compromise in private in an employment dispute are not mutually exclusive. However, where a compromise agreement has been reached between a council and a senior employee of that council, a balance has to be struck between a public authority's duty to be transparent and accountable about how and why it decided to spend public money in a particular way and a public authority's duty to respect their employees reasonable expectations of privacy.
26. The Commissioner has no grounds to assume that disclosure of 'the cash pay off figure' is within Ms Sugar's reasonable expectations. Ms Sugar signed a compromise agreement and the Commissioner considers that the confidentiality

clause in the contract, which is binding upon both parties, does not specify an agreed position in the event of an FOIA request. However, the Commissioner considers that the clause could be read widely enough to cover a full disclosure of the requested information.

27. The Commissioner has made it clear in his guidance on the section 40 exemption and on other public platforms that the seniority of the individual should be taken into account when personal data about them are being requested under the Act:

“It may also be relevant to think about the seniority of staff: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair.” ICO Awareness Guidance 1 – Personal Information)

<http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%201%20personal%20info.pdf>

28. An employee or agent of a public authority who makes decisions which involve significant expenditure of public funds should expect greater scrutiny about their role for which they are paid out of public funds commensurate with their level of responsibility. Generally speaking, however, the Commissioner believes that information which might be deemed 'HR information' should remain private, e.g., a person's individual tax code, their pension contributions or trade union subscriptions and other information normally held by an organisation's Human Resources department. The Commissioner recognises the strength of the public authority's argument that there is a strong expectation of privacy attached to the requested information even though it relates to her professional life rather than her personal life.
29. In this case the Commissioner notes that the figure paid to Ms Sugar consists of her pension entitlement which has been paid in accordance with the Local Government Pension Scheme and the Local Government (Early Termination of Employment)(Discretionary Compensation) (England and Wales) Regulations 2000<http://www.opsi.gov.uk/si/si2000/20001410.htm>.
30. The Commissioner believes that the legitimate interests of the public in knowing how much public money was spent on the departure of Mrs Sugar must be weighed against Mrs Sugar's rights and legitimate interests. Mrs Sugar has the right under the Employment Rights Act 1996 to reach a compromise agreement in private with her employer. She has exercised that right and in doing so is bound by the terms of that compromise agreement.
31. The Commissioner recognises that there may be circumstances where it would be legitimate to release information of this nature relating to the unexpected retirement of a senior official at a public authority. However, in the circumstances of this case, he believes it would not be possible to do so here without contravening the requirements of the first data protection principle of the DPA.

Section 41 – Information provided in confidence

32. In view of the fact that the Commissioner considers the most appropriate exemption in this case to be section 40 he has not considered the application of section 41 any further in this Decision Notice.

The Decision

33. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. 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

Reference: FS50071454



Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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 2 day of October 2006

Signed

**Phil Boyd
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 40 – Personal Information

40. - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

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

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the 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.

(4) 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).

(5) 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).

(6) 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.

(7) 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.