

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 April 2011

Public Authority: Powys County Council
Address: Council Offices
County Hall
Llandrindod Wells
Powys
LD1 5LG

Summary

The complainant asked to view information contained in historical school admissions registers for two named schools within the boundaries of Powys County Council, which the Council held in its archive. The Council refused to provide access to the registers citing section 40(2) of the Act. The Commissioner has investigated and finds that the Council correctly applied section 40(2) of the Act. The Commissioner has also recorded a breach of section 17(1) 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.

Background

2. In March and November of 2007 the complainant obtained access to a number of School Admissions Registers at the Powys archive. On both occasions the Archives Network Wales website (the website of the Archives and Records Council Wales, a representative body for institutions and organisations involved with the administration of archives in Wales) listed these documents as subject to '*no restrictions*'. However, during the complainant's visit in November 2007 he alleged that, without warning, a 100 year restriction, or 'closure period' was

imposed on the documents; ie the Council stated that the records would not be available to the complainant for 100 years from the date they were created. The complainant provided print outs from the website as evidence in support of his statement.

3. The complainant had already copied the data he wanted from approximately half of the relevant register before being stopped. The complainant was subsequently asked to sign a 'C4 waiver', which he did. This is a declaration signed by researchers that as a condition of access to data that might otherwise be closed, they will comply with the relevant conditions and data protection principles (1, 3-4 and 6-8). However, he was still denied access to the relevant information.
4. There followed significant correspondence between the complainant and the Council's archivist and in August 2008 the complainant sent her a lengthy list of all the school admissions registers he might eventually wish to see. The Council considered this as a request for information under the Act and issued a refusal notice on 19 September 2008.
5. The Council informed the complainant that access to the registers was being refused on the basis that they contained personal information that was exempt from disclosure under of section 40(2) of the Act. The Council did however confirm that the complainant could view the requested records that fell outside of the 100 year restricted period in the 'Llanafan Fawr School Admissions Register for 1878-1908'.
6. The Council also informed the complainant that not all of the information in the registers he wished to view was subject to restricted access and that it could, in theory, extract this information for him. However, the Council said that to do so would exceed the appropriate cost limit specified in the Act and that it was not therefore required to provide the information.
7. The complainant did not pursue the matter further at the time. Based on the information the Commissioner has viewed, it appears that the complainant agreed with the the Council that he would await the outcome of an on-going complaint being investigated by the Commissioner that related to the same or similar information. However, it transpired that no such complaint was being considered by the Commissioner.
8. The Commissioner is mindful that a significant proportion of information contained in archives of school admissions registers is likely to include personal information of individuals. As such, the processing of such information must comply with the data protection principles contained within the Data Protection Act 1998 ('the DPA'). He notes that the Society for Archivists has produced guidance on this issue in its '*Code of*

Practice for archivists and records managers under Section 51(4) of the Data Protection Act 1998'.

9. Chapter 4 of the Code specifically concerns the responsibilities of archivists for the personal data held by them. Section 4.9.2 of the Code notes that, whilst access to archives will normally be permitted for historical or statistical research, the information is subject to closure periods of up to a maximum of 100 years. The code goes on to say that where administering shorter closure periods or otherwise authorising the disclosure of the information, archivists should be able to cite Conditions in Schedules 2 and 3 of the DPA as applicable. The Commissioner notes that this Code conforms to his own analysis of fairness and lawfulness balanced against any legitimate public interest in disclosure.

The Request

10. On 12 February 2010 the complainant contacted the Council to request sight of the following information: the name, date of birth, abode and parent's name in the Powys School Admissions Registers for Cwmteuddwr Registers, Book 2, Ref RE/PS/9 (1932- 1978), and Llanafan Fawr School Admissions Registers, Ref BE/PS/38, (1878-1908, 1902-1934 and 1927-1980).
11. On 16 February 2010 the Council contacted the complainant and informed him that according to its records he had already requested sight of this information in a letter of 14 August 2008, and attached a copy of its previous refusal notice which cited section 40(2) and section 12 of the Act. The Council referred the complainant to its previous response of 19 September 2008 and thereby indirectly provided details of its internal complaints procedure.
12. The complainant contacted the Council on 26 February 2010 to express his dissatisfaction with its response to his request. The Council conducted an internal review of its handling of the request and issued its response on 13 April 2010. The Council upheld its decision of 16 February 2010 and reiterated comments from its letter of 19 September 2008, which set out the Council's view that the information was exempt from disclosure under Section 40(2) of the Act. The Council explained that school admission registers and log books are closed for the lifetime of the child, which unless a death can be evidenced, is assumed to be 100 years. The Council further informed the complainant that disclosure of the information would breach the first data protection principle.

The Investigation

Scope of the case

13. On 7 May 2010 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 following points:
 - The Council's application of section 40(2) of the Act.
 - The Council's procedural handling of his request for information.
14. As discussed in paragraph 5 of this notice, part of the request was for information outside of the 100 year restriction period (the Llanafan Fawr School Admissions Registers, Ref BE/PS/38, (1878-1908)) and as the Council had already informed the complainant he could view this information without restriction, this part of the request has not been included in the Commissioner's investigation.
15. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

16. On 20 July 2010 the Commissioner contacted the Council to request copies of the withheld information.
17. The Council provided some background to the issues surrounding the request on 6 August 2010, together with a sample of the withheld information.
18. On 4 October 2010 the Commissioner contacted the Council to ask for further arguments regarding its application of section 40(2) of the Act, to request samples of the withheld information and to clarify the time period covered by the request.
19. The Council provided a substantive response on 26 October 2010 including an additional sample of information.
20. The Commissioner contacted the Council on 21 January 2011 in an attempt to resolve this matter informally but on 2 February 2011 the Council asked the Commissioner to issue a formal decision notice.

Analysis

21. The full text of all sections of the Act referred to in this notice can be found in the Legal Annex at the end of this notice.

Exemptions

Section 40(2) – Personal information

22. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles.
23. In its letter to the complainant of 13 April 2010, the Council argued that restrictions on access apply to all records, including school admission registers, containing personal data that are held in its archives. It also confirmed that school registers and log books are closed for the lifetime of the child which is assumed to be 100 years (unless evidence of death is provided).
24. The Council also argued that disclosure of the information requested would lead to unjustified and unnecessary damage and distress to the data subjects, that this would be unfair and therefore contravene the first data protection principle.
25. However, the complainant pointed out that his request for information did not include information contained in fees registers, punishment registers or school log books but focused on school admission registers for two named schools. He pointed out that he only wanted access to four columns of information (names, date of birth, abode and parent's name) all of which, he stated, were contained on one page of the register.
26. The complainant accepted that the information contained in the four columns he referred to is personal data but disagreed with the Council's view that disclosure would breach the first data protection principle. The complainant argued that the Council was out of step with archivists in other record offices where the average restrictions tended to be between 15 and 30 years.
27. In order to reach a view on the Council's application of this exemption, the Commissioner firstly considered whether or not the requested information was in fact personal data.

Is the requested information personal data?

28. Personal data is defined at section 1(1) of the DPA as:

“personal data means data which relate to a living individual who can be identified-

(a) from those data,

(b) from those data and other information which is in the possession of, or 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.”

29. When considering whether the information is personal data, the Commissioner had regard to his own published guidance, *'Determining what is personal data'*.¹

30. Taking into account his guidance on this matter, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:

(i) “Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?”

(ii) “Does the data ‘relate to’ the identifiable living individual, whether in personal or family life, business or profession?”

31. The Commissioner has considered the information requested and accepts that it is possible that some of the individuals whose data is contained within the registers are no longer living. However, he has noted the guidance in Section 4.1.5 of the *'Code of Practice for archivists and records managers under section 51.4 of the Data Protection Act 1998'*, which states:

“Given the large number of individuals commonly featuring in archive collections, archivists will not be in a position to ascertain whether they are still alive and hence protected by the Act. [DPA] If it is not known whether a data subject is alive or dead, the following working assumptions can be used:

¹http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

- *Assume a lifespan of 100 years*
- *If the age of an adult data subject is not known, assume that he was 16 at the time of the records*
- *If the age of a child data subject is not known, assume he was less than 1 at the time of the records"*

32. The Commissioner considers the above assumptions to be reasonable and has considered the sample of the withheld information provided by the Council. He notes that the information contains the dates of birth of pupils that indicate that they were not 100 years old at the date of the request. The Commissioner has seen no evidence of the death of any of the data subjects.
33. Taking into account the above, the Commissioner has concluded that the majority of the information requested does constitute personal data. However, the Commissioner notes that part of the information requested under the heading of the Llanafan Fawr School Admissions Register for the period 1902-1934 falls outside of the 100 year restriction period and does not therefore constitute personal data.

Would disclosure contravene the first data protection principle?

34. The Council has stated that disclosure of the information would breach the first data protection principle. The first data protection principle requires that the processing of personal data be fair and lawful and,
- at least one of the conditions in schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
35. In the case of personal data, both requirements (fair and lawful processing and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

36. In considering whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
- The reasonable expectations of the data subjects.
 - Consequences of disclosure.
 - The legitimate interests of the public.

The reasonable expectations of the data subjects

37. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example privacy. It is accepted that every individual has the right to some degree of privacy and this right is enshrined in Article 8 of the European Convention on Human Rights.
38. The Commissioner considers that this right to privacy and family life is of particular relevance to the requested information as it relates to the personal and family life of each individual. The Commissioner notes that in this case disclosure would involve the details of some very private information being placed into the public domain; for example it would mean disclosing that some of the data subjects either lived in a children's home or were fostered or adopted.
39. The fact that this information relates to their private as opposed to public or professional lives has further significance. The Commissioner's awareness guidance on 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 life.² Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."
40. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
41. As the information in question relates to the private lives of the data subjects, the Commissioner considers it to deserve more protection than if it related to their public or professional lives. Additionally, the fact that this information was recorded when the data subjects were children

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx

further increases the expectation that it would be protected from disclosure to the world at large.

42. The Commissioner has also considered the circumstances in which the personal data was obtained and notes that, at the time this information was recorded, the first legislation regarding data protection had yet to be passed. Data subjects would not therefore have been provided with any fair processing notices and it is unlikely that they would have had any expectations that these details would have been disclosed into the public domain.
43. Based on the above, the Commissioner has concluded that the data subject would have a reasonable expectation that the information would not be disclosed.

The consequences of disclosure

44. The Commissioner has noted the Council's comments in its internal review that the release of the data:

"...could potentially cause unnecessary and unjustified damage and distress to the individuals in this case."

45. The Council argued that disclosure of the information would reveal details of children living in a children's home or children who were adopted or fostered. The Commissioner accepts that disclosure of such information poses a very real possibility of causing distress to the individuals concerned.
46. The Council has also argued that disclosure of this information increases the risk that the data subjects could be vulnerable to identity theft. The Commissioner considers that the risk that disclosure of the requested information could be linked with other information about the data subjects already known to a potential fraudster does increase the potential for identity theft. He therefore considers that disclosure presents real potential for causing damage and distress to the data subjects.

The legitimate public interest

47. Notwithstanding the data subjects' reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. For example, in the case involving the MP's expenses the former Information Tribunal commented that:

'79. ...in relation to the general principle application of fairness under the first data protection principle, we find:

(..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'.

48. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
49. The Commissioner notes that the Council is prepared to allow the complainant access to the information which does not engage section 40(2) but that the complainant has refused.
50. In this particular case, the Commissioner accepts that in addition to the broad general principles of accountability and transparency there is a legitimate public interest in pursuing historical research. However, this right cannot override the requirement to comply with the DPA.
51. The Commissioner accepts that there is a legitimate interest in disclosure but considers it to be outweighed by the reasonable expectations of the data subjects and the potential consequences of disclosure. The Commissioner has therefore determined that it would not be fair to disclose the requested information.
52. In summary, and taking into account the above factors, the Commissioner has determined that disclosure of the post February 1910 information would constitute the disclosure of personal data and that disclosure would not be fair. Having determined that it would not be fair to disclose the requested information, it is not necessary for the Commissioner to consider a Schedule 2 condition, as in the Commissioner's opinion, disclosure would breach the first data protection principle.

Procedural Requirements

Section 1 – Right to information

53. 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."*

54. The Council's failure to make available information Llanafan Fawr School Admissions Register, Ref BE/PS/38 (1902-1934) which was 100 years or older at the time of the request represents a breach of section 1(1)(b) of the Act.

Section 10 – Time for compliance with the request

55. Section 10(1) concerns the time for compliance and requires a public authority to provide all information which does not engage an exemption to be provided within 20 working days of receipt of the request. The Council's failure to provide the information to the complainant referred to in paragraph 54 of this notice therefore represents a breach of section 10(1) of the Act.

Section 17 – Refusal of request

56. Section 17(1) of the Act requires a public authority refusing to provide information under any of the exemptions in Part II of the Act to give the applicant a notice stating that fact.

57. Whilst the Commissioner acknowledges that the Council did enclose a copy of its previous refusal notice, the Council's failure to issue a valid refusal notice in respect of this request for information within the specified time limit represents a breach of section 17(1) of the Act.

58. Section 17(7)(a) sets out the requirement that public authorities must notice, although the Council provided details of its internal complaints procedure in its previous refusal notice, its failure to do so in a refusal notice specific to this request therefore represents a breach of section 17(7)(a) of the Act.

The Decision

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

- The Council correctly withheld the majority of the requested information (post February 1910) under section 40(2) of the Act.

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

- The Council's failure to provide the information referred to in paragraph 54 of this notice represents a breach of section 1(1)(b) and 10(1) of the Act.
- The Council's failure to issue a valid refusal notice to the complainant represents a breach of section 17(1) of the Act.
- The Council's failure to provide details of its internal complaints procedure represents a breach of section 17(7)(a) of the Act.

Steps Required

61. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:

- Either provide the information outside of the 100 year restriction period (paragraph 5) or issue a valid refusal notice stating why the information cannot be provided.

Failure to comply

62. 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.

Right of Appeal

63. 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

64. 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.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 5th day of April 2011

Signed

**Anne Jones
Assistant Commissioner
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 17(7) provides that –

"A notice under section (1), (3) or (5) must –

contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure,

Personal information

Section 40(2) provides that –

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

(d) it constitutes personal data which do not fall within subsection (1),
and

(e) either the first or the second condition below is satisfied.”

The Data Protection Act 1998

The first principle states that:

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

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.