

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 February 2013

**Public Authority:** High Peak Borough Council  
**Address:** Town Hall  
Buxton  
Derbyshire  
SK17 6EL

### **Decision (including any steps ordered)**

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1. The complainant requested a breakdown of fees paid to consultants between 1998 and 2011, in connection with a development project. High Peak Borough Council (HPBC) provided some information relating to limited companies, but withheld the remainder on the grounds that it was the personal data of sole traders and was therefore exempt under section 40(2). The Commissioner's decision is that HPBC cited the exemption provided by section 40(2) incorrectly and that this information should have been disclosed.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the names of and fees paid to the three consultants whose details were withheld.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Request and response**

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4. On 8 November 2011, the complainant wrote to HPBC and requested information in the following terms:

*"Total expenditure on consultants, independent experts and external lawyers in respect of the Crescent.*

- 1. Please confirm that the total expenditure in respect of the above between 1/4/98 and 31/3 is £1,292,096.47.*
  - 2. Please provide a breakdown showing which and who was paid these fees."*
5. HPBC responded on 7 December 2011. It provided some information within the scope of the request, identifying sums paid to named limited companies. However, it explained that fees paid to individuals, sole traders and small partnerships, totalling £156,025.75, had been grouped together under the heading "Other Consultants". It explained that it would not provide a breakdown for this. It cited section 40 as its basis for doing so, stating that to provide information which identified individuals, sole traders or small partnerships would breach the Data Protection Act 1998 (the DPA).
  6. Following an internal review on 14 February 2012, HPBC wrote to the complainant. It maintained its position.

### **Scope of the case**

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7. On 7 March 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He argued that in view of the size of the figure listed under "Other Consultants" it was in the public interest to provide a breakdown of the payments.
8. The Commissioner therefore considers the focus of the investigation to be whether HPBC is entitled to rely upon section 40 in respect of the withheld information.

### **Reasons for decision**

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9. Section 40(2) of the FOIA provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. The task for the Commissioner when considering this exemption is twofold; first, consideration of whether the requested information constitutes the personal data of any third party.

Secondly, it must be considered whether the disclosure of this information would be in breach of the data protection principles.

10. Considering firstly whether the requested information is the personal data of any third party, the definition of personal data is given in section 1(1) of the DPA:

*"personal data' means data which relate to a living individual who can be identified-*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".*

11. HPBC stated that the withheld information identified payments made by the Council to three consultants who operated as sole traders. The Commissioner investigated this point and, through a series of internet searches, ascertained that two of the consultants were in fact limited companies, a point which HPBC then conceded.
12. He therefore concluded that information about payments made to these two consultants did not fall under the DPA's definition of personal data, and that section 40 of the FOIA was not engaged in respect of them. HPBC is therefore required to disclose this information.
13. Turning to the third consultant, the Commissioner established to his satisfaction that he was indeed operating as a sole trader. The Commissioner's position is that information about the business of a sole trader will amount to personal data, as information about the business will be about the sole trader. In this case, information about payments made to the sole trader will be information about his income.
14. The Commissioner therefore agreed with HPBC's assessment in respect of the third consultant, in that the requested information constituted his personal data, in accordance with the definition given in section 1(1) of the DPA.
15. Turning to whether disclosure of that personal data would be in breach of any of the data protection principles, the Commissioner has focussed here on the first data protection principle. The first principle requires that personal data be processed fairly and lawfully and the particular focus here is on

whether disclosure would be, in general, fair to the data subject.

16. In forming a view on whether disclosure would be fair, the Commissioner has taken into account the reasonable expectations of the data subject, the consequences of disclosure upon the data subject and whether there is legitimate public interest in the disclosure of the information in question.
17. On the issue of the reasonable expectations of the data subject, HPBC has stated that it has consulted the data subject and that he has refused to give consent to the release of the requested information. However, whilst this is relevant, even where there is an absence of consent, circumstances may mean that disclosure is nonetheless fair.
18. Whilst the data subject's refusal may suggest that he prefers to maintain a high degree of privacy about his occupation, the Commissioner notes that he lists HPBC as a client on his consultancy's website. Thus, the fact that a business relationship exists between the data subject and HPBC cannot, of itself, be considered confidential.
19. HPBC has explained that the data subject was not informed at the time of contracting of the possibility that information may be releasable under the FOIA. However, the Commissioner's view on businesses which contract with public authorities is that they should expect those arrangements to (potentially) be subject to a greater degree of public scrutiny than where they contract with privately owned organisations. Where a public authority is purchasing goods or services, there is a public interest in ensuring that it gets value for money.
20. In general, the approach of the Commissioner is that information that relates to an individual in their professional capacity will be subject to a significantly lower expectation of privacy than information concerning their private life.
21. For example, when considering the issue of the disclosure of public authority employees' salary information, the Commissioner considers that disclosure of the exact salary of an individual will be more intrusive than giving a salary band or the pay scale for their post. It is now commonplace for public authorities to publish information about staff salaries in this generalised fashion.

22. The Commissioner considers that similar arguments apply in this case. While payments made by a public authority to a sole trader will relate to the data subject's financial circumstances, here the information relates to a total figure paid to the consultancy over a 13-year period. It does not take account of expenses or costs incurred by the consultancy in providing its services or its other sources of income for the period, or detail what the services provided were. The Commissioner therefore does not consider its disclosure to be overly intrusive, in the way that, say, the figure broken down into payments made year-by-year might be.
23. Finally, and crucially, the Commissioner notes that the primary concern of HPBC seems to be that the data subject would be commercially disadvantaged by the disclosure. These are arguments which the Commissioner would consider more appropriately made under section 43, rather than under section 40. Furthermore, HPBC has not supplied arguments which demonstrate that disclosure would be overly intrusive with regard to the data subject's private life, despite twice being invited by the Information Commissioner to do so.
24. Therefore, for the reasons cited above, the Commissioner's view on the issue of data subject expectation is that, although HPBC might have inadvertently created an expectation that this information would not be disclosed by seeking consent to its disclosure, this expectation was not realistic.
25. As to the consequences of disclosure upon the data subject, HPBC has argued that disclosure of the total sum paid to the data subject's consultancy between 1998 and 2011 would place the data subject at a commercial disadvantage. It has cited the data subject's claim that the information is commercially sensitive, stating:

*"I am advised by the service area that [the data subject] is a sole trader and that the [business area] profession is very small and highly competitive. [The data subject] has made it clear to us that his payments should not be disclosed because if they were then that would enable his competitors to gain an understanding of his fee rates and therefore an unfair advantage. As a sole trader disclosure would potentially have a damaging impact on [the data subject] as an individual and therefore it is considered that section 40 continues to apply."*

26. The Commissioner twice asked HPBC to be more specific about the damaging impact on the data subject. Specifically, he asked it to explain how a competitor might ascertain fee structures, or anything else of commercial advantage, from a single figure which represents total payments made over the course of 13 years, and which does not identify the services that were provided by the data subject or the time frame involved within that 13 year period. The information on its own does not give away whether a single payment was made to the data subject or whether he was contracted on several different occasions.
27. HPBC did not elaborate further on this point. The Commissioner's second invitation to submit more compelling arguments in support of the application of section 40 made it clear that in the absence of such arguments he would be minded to conclude that section 40 was not engaged. HPBC's response did not offer any such arguments. It merely reiterated that the information was personal data and commented that its disclosure would mean that any sole trader who supplies goods and services to it would be in the same position as a limited company.
28. The Commissioner has noted in paragraph 23 that the arguments advanced by HPBC focus on the commercial impact of disclosure on the data subject, an approach which he would normally expect to be taken by applying section 43. He further notes that identical information relating to several other businesses (not sole traders) is covered by the request but that HPBC has not sought to argue that they would be commercially disadvantaged by its disclosure, despite the provision under section 43 relating to protection of commercial interests.
29. Therefore, from the information he has available to him, the Commissioner does not agree that the disclosure of the data subject's identity and the sum paid to his business over a period of 13 years would be likely to have the detrimental impact suggested by HPBC.
30. As to whether there is any legitimate public interest in this information, whilst the exemption provided by section 40(2) is not qualified by the public interest, in relation to any disclosure of personal data it is necessary for a condition from Schedule 2 of the DPA to be fulfilled in order to comply with the first data protection principle. The Commissioner has considered here the

sixth condition, which is satisfied if the disclosure is necessary in the public interest.

31. The Commissioner believes that there is a public interest in the scrutiny of how public money is spent, including the purchasing of goods or services from private sector organisations. Transparency of decisions on how public funds are spent will also generate confidence in the integrity of the procedures involved.
32. The sum of money involved in this case is quite substantial. Where a public authority is purchasing goods or services there is a public interest in ensuring it gets value for money. This is particularly relevant at a time when there is a public debate around the increasing role private companies have in delivering public services.
33. The Commissioner therefore considers that there is a public interest in disclosing the information.
34. As to whether disclosure of the information would be necessary for the purposes of that public interest, the issue here is whether this public interest could be served through other means without any impact upon the privacy of the data subject. The approach taken by HPBC suggests that this information is not available elsewhere, and so the Commissioner finds that it would be necessary for it to be disclosed in response to the complainant's request, in order to satisfy this public interest.
35. The Commissioner has found that the data subject could not hold a reasonable expectation that the information in question would not be disclosed and that there is no reasonable evidence that disclosure would result in distress to the data subject. He has also found that disclosure is necessary for the purposes of a legitimate public interest. He therefore concludes that disclosure would be fair and in accordance with the first data protection principle.
36. As the disclosure would not breach the first data protection principle, the overall finding of the Commissioner is that the exemption provided by section 40(2) is not engaged in respect of the third consultant. HPBC is therefore required to disclose this information.

## Right of appeal

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37. 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@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

38. 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.

39. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**