

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 July 2013

**Public Authority:** Cardiff Council  
**Address:** County Hall  
Atlantic Wharf  
Cardiff  
CF10 4UW

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of a specified report in connection with a Compulsory Purchase Order of a named property within the Cardiff Council's boundaries and its subsequent sale. The Council provided a redacted copy of the report, withholding some information on the basis of section 40(2) and other information by virtue of section 41(1) of the FOIA.
2. The Commissioner's decision is that Cardiff Council has correctly applied section 40(2) and section 41(1) of the FOIA.
3. The Commissioner requires no steps.

#### Request and response

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4. On 1 September 2012, the complainant wrote to Cardiff Council and requested the following information in respect of a report resulting in a Compulsory Purchase Order (CPO) of a named property within the Council's boundaries:  
  
*"What is the exact text of the report referred to under reference DEL/02/2009 dated 10 February 2009 that the officer who made the CPO regarding [named property] took into account when making the CPO.*
5. The Council responded on 26 October 2012, providing a copy of the report redacted on the basis of section 40(2) of the FOIA.

6. Following an internal review, the Council wrote to the complainant on 31 October 2012. It informed the complainant that it was satisfied with the redactions made to the report and confirmed that in addition to its reliance on section 40(2); it was now also relying on section 41 as the complainant had recently confirmed that some individuals named within the report were deceased. The complainant was also given details of how to make a Subject Access Request for information containing a reference to him and provided with the appropriate request form.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 4 November 2012 to complain about the way his request for information had been handled. The complainant stated that the report contained numerous redactions, most of which he did not consider valid. The complainant expressed dissatisfaction with having his own name redacted under section 40 of the FOIA. The Commissioner considers that as the complainant's name is his own personal data, that this should have been considered under the Data Protection Act 1998 ('the DPA') and has not therefore considered this in his analysis of section 40 of the FOIA outlined in paragraphs 10 to 28 of this notice.
8. The complainant also disagreed with the Council's original decision to cite section 40(2) in relation to the names of his deceased parents and he expressed dissatisfaction with the Council reliance on section 40(2) in relation to the names of Council Officials.
9. The Commissioner notes that during his investigation of the complaint, the Council offered to provide a copy of the report to the complainant outside of the FOIA, with only the names of its Council Officials redacted. The complainant refused this offer and chose to exercise his rights under section 50 of the FOIA.

## **Reasons for decision**

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### **Section 40(2)**

10. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach any of the data protection principles.
11. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether the requested information

does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

### **Is the requested information personal data?**

12. 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."*

13. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data".<sup>1</sup>*

14. On the basis of this guidance, 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?"*

15. The Commissioner notes that the information withheld under this exemption is the names of the relevant Council Officials.

16. Having considered the information, the Commissioner is satisfied that it does contain information which constitutes personal information as described above. He has therefore considered whether disclosure would breach any of the data protection principles. The Commissioner notes

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/what\\_is\\_data\\_for\\_the\\_purposes\\_of\\_the\\_dpa.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf)

that although the Council has not specified which principle of Data Protection Act 1998 (the DPA) it considers would be breached by disclosure, it has stated that disclosure of the information would not be fair and lawful. The Commissioner has therefore considered the first principle.

**Would disclosure contravene the first data protection principle?**

17. The first data protection principle requires that the processing of personal data be fair and lawful and,
  - a. at least one of the conditions in schedule 2 is met, and
  - b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
  
18. 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?*

19. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
  - a. The reasonable expectations of the data subjects.
  - b. Consequences of disclosure.
  - c. The legitimate interests of the public

*The reasonable expectations of the data subjects*

20. The Commissioner's guidance regarding 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.<sup>2</sup> Although the guidance acknowledges that there are no hard and fast rules it states that:

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<sup>2</sup>[http://www.ico.gov.uk/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_speci alist\\_guides/PERSONAL\\_INFORMATION.ashx](http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speci alist_guides/PERSONAL_INFORMATION.ashx)

*"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."*

21. 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).
22. However, the Commissioner is mindful that not all information relating to an individual's professional/public life is suitable for disclosure and each case must be considered on its merits. Public authorities often hold significant amounts of information relating to the professional or public role of individual data subjects yet each data subject may have a reasonable expectation that all or some of this data would not be disclosed.
23. As referred to in paragraph 15 of this notice, the Commissioner notes that the information withheld under this exemption is the names of Council Officials.
24. The Commissioner has considered the reasonable expectations of the Council Officials named in the report. Whilst the Commissioner notes that the information relates to their professional or public life, the Council has argued that roles of each of those individuals is below Operational Manager level and although senior managers may have a reasonable expectation that their names would be disclosed, this is not the case for those named in the report. The Council has also confirmed that those individuals had no decision making powers.

#### *Consequences of disclosure*

25. The Commissioner has considered the consequences of disclosure of the names of the Council Officials. The Council has argued that the disclosure of their names makes them vulnerable to members of the public contacting them in relation to the report, and in so doing opens up the potential for junior members of staff to be harassed. The Council has added that prior to it setting its working assumption regarding the disclosure of staff names, it consulted informally with a considerable number of employees and many reported cases of an escalating number of unsolicited calls.

*The legitimate public interest in disclosure*

26. 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.
27. In addition to the broad general principles of accountability and transparency of public sector organisations, there is also a specific public interest in the names of an individual council officials linked to a CPO being disclosed.
28. In weighing up the balance between the reasonable expectations of the data subjects' and the consequences of disclosure against the legitimate public interest in disclosure, whilst it is clear that there is a public interest in the disclosure of the information, the balance is weighed more heavily in favour of non- disclosure. He is therefore satisfied that the Council was correct to withhold the above information on the basis of section 40(2) of the Act.

**Section 41**

29. Section 41(1) of the FOIA states that:

*Information is exempt information if –*

- (a) It was obtained by the public authority from any other person (including another public authority), and*
  - (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person"*
30. As section 41 is an absolute exemption, it is not subject to the public interest under the FOIA.
  31. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
    - whether the information has the necessary quality of confidence;
    - whether the information was imparted in circumstances importing an obligation of confidence; and
    - whether disclosure would be an unauthorised use of the information and to the detriment of the confider.

18. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
32. In this case, the disputed information is the names of three individuals referred to in a report prepared by Private Sector Housing regarding a request for making a Compulsory Purchase Order (CPO). Two of the individuals were the former owners of the property and the third had been one of two beneficiaries but had subsequently passed away before the matter could be settled. The Commissioner accepts that the redacted information in the report contains information obtained from a third party therefore the requirement of section 41(1) (a) is satisfied.
33. The Commissioner also notes that no evidence has been put before him that the withheld information has been put in the public domain. The Commissioner would not generally expect divulging details of the former owners of a property subject to a CPO and one of its beneficiaries to be put in the public domain. He is therefore satisfied that the information is not accessible by other means.
34. The Council has argued that this information would be important to the named individuals. Given the nature of the information, the Commissioner is satisfied that the information is not trivial.
35. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence.
36. The Commissioner has therefore gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
37. The information relates to the names of individuals linked to a property subject to a CPO. The Commissioner is satisfied that an implicit obligation of confidence is created between the deceased individuals, Private Sector Housing and the Council.
38. The Commissioner therefore went on to consider whether disclosure of the information would be to the detriment of the confider.
39. The Commissioner is mindful of the Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15* that the loss of privacy can be a detriment in its own right. In this particular case, he considers that the names of individuals linked to a property subject to a CPO constitutes information of a personal nature. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for it



to be protected by the law of confidence other than the loss of privacy in its own right.

40. In this case, the Commissioner considers that disclosure would be contrary to the deceased persons' reasonable expectations of maintaining confidentiality in respect of their private information. He therefore considers the absence of detriment would not defeat a cause of action.
41. The Commissioner also considers that whilst disclosure would cause no harm to the confider, knowledge of the disclosure of the fact that these individuals were linked to a property subject to a CPO could distress surviving relatives. The Commissioner can confirm that there is at least one other living relative of the deceased individuals in addition to the complainant.
42. The Commissioner also considers that knowledge that confidential information has been passed to those whom the confider may not willingly convey it to, may be sufficient detriment in itself. This was supported in the Tribunal's decision in the case of *EY v ICO and Medicines and Healthcare Products Regulatory Authority* [EA/2010/0055] paragraph 13.
43. The Commissioner has therefore gone on to consider whether there is a public defence for a breach of confidence.
44. The Commissioner accepts that there is a public interest in the disclosure of the names of individuals linked to a property subject to a CPO being in the public domain. He also accepts the complainant has a personal interest in this information but notes that the Council has offered to disclose it to him outside of the provisions of the FOIA. However, in weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.
45. The Commissioner is also guided by paragraph 8 of the Tribunal decision referred to in paragraph 42 of this notice, that it is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing an obligation of confidence. The Commissioner is mindful of the need to protect the relationship of trust between the confider and the confident; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
46. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining that



trust. He therefore finds that the Council would not have a public interest defence for breaching its duty of confidence and that the request for information is exempt under section 41 of the FOI. He has therefore concluded that the Council applied the exemption appropriately.

## Right of appeal

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47. 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)

48. 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.
49. 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 .....**

**Andrew White**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**SK9 5AF**