

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 23 May 2007

**Public Authority:** Commission for Local Administration in England  
**Address:** Commission for Local Administration in England  
10th floor, Millbank Tower  
Millbank  
London  
SW1P 4QP

### Summary

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The complainant made a complaint to the Local Government Ombudsman (LGO) about his County Council. He was unhappy with the LGO's handling and made an internal service complaint against the LGO's investigator. He also submitted three successive requests for information about the LGO's complaints-handling statistics; the LGO's investigator and his handling of the complainant's case; and information from the internal service complaint. The LGO stated that it did not hold some of the information, provided other parts of it, and withheld the rest citing sections 36 and 40 of the Freedom of Information Act 2000 ('the Act') in respect of some, and section 44(1)(a) for the rest. The Commissioner decided that section 40 did apply and that it was therefore not necessary for him to consider the LGO's application of section 36. In relation to the rest of the information, to which section 44 had been applied, the Commissioner decided that some of this had been improperly withheld under section 44 and should now be disclosed.

### The Commissioner's Role

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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

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2. The complainant made a complaint about his County Council to the Local Government Ombudsman (LGO) on 25 January 2005. He was unhappy with the way that the LGO dealt with that complaint and submitted an internal service complaint about the investigator.

### 3. The complainant's first request

4. On 18 April 2005 the complainant asked the LGO to provide him with the following information:

*'1/ The length of time [the LGO's investigator] has been employed as an Investigator by the LGO.  
2/ The number of complaints made to the LGO in total for the last year for which records are available.  
3/ The number of complaints from that total which were formally investigated by the LGO.'*

5. The substance of the LGO's response dated 20 April 2005 to the respective parts of the complainant's request was as follows.

- *'[T]his is "personal data" and is covered by an exemption from disclosure under section 40 of the Freedom of Information Act 2000. This exemption says that information requested should not be disclosed if this would contravene the eight Data Protection Principles, as set out in the Data Protection Act 1998. I take the view that release of length of service would contravene these principles.'*
- The LGO sent the complainant a copy of its annual report for 2003/2004 and referred him to the details of complaints received which was to be found on pages 25-26. It pointed out that the report for 2004/2005 would be published in July 2005.
- *'This is not a figure we record', but the LGO referred to the breakdown of the outcome of complaints determined in 2003/2004 which was to be found on page 27 of the report. It advised the complainant that "the different outcomes do not equate to whether complaints were "formally investigated" or not', since complaints ultimately adjudged to be 'outside jurisdiction' were in a few instances subject to an abortive formal investigation.*

6. On 22 April 2005 the complainant complained to the LGO about this response. In a separate letter of the same date he asked the LGO to *'explain your incompetence in not sending me a copy of your Publication Scheme referred to in the first paragraph of your Complaints Procedure'*.

7. The LGO reviewed its response to the complainant's information request and replied on 6 May 2005. It confirmed its view that section 40 applied, and added that:

*'disclosures that would "prejudice the effective conduct of business" are excluded under section 36 of the Act. I believe that to provide information on the length of service of particular investigators would prejudice the effective conduct of the Commission's business as this could lead to a situation where the public and councils would only wish to have their cases dealt with by investigators of a particular level of experience. I consider the*

*public interest of preventing such a situation arising outweighs the interest of accountability and transparency of the decisions we take on the complaints sent to us'.*

In relation to parts 2 and 3 of the complainant's first request, the LGO pointed out again that *'the term "formally investigated" is not one that we use or which matches our records'*, and the summary data which was available was published in the organisation's annual report.

### **The complainant's second request**

8. The complainant made a second freedom of information request on 22 May 2005, in which he asked for the following information.

*'1/ All information held by the Ombudsman in any form relating to [the investigator's] handling of my case including notes, records of phone-calls, records of contacts with the Council, records of contacts with other LGO staff including Deputy Ombudsmen, records of work done on the case and of any actions taken, minutes and/or records and dates of any meetings between [the investigator] and other parties, including LGO staff including [the investigator's] contact with staff after my complaints to him dated 21 March and 14 April 2005, all e-mails and memos and other internal and external documents relating to my case and all information held on [the investigator's] computer relating to my case including my complaint against him.*

*2/ All information held by the Ombudsman in any form relating to my complaint against [the investigator] including internal or external documents such as memos, e-mails or phone-calls, all information on Mr King's response to my complaint dated 18 April 2005 including information held on his computer, records of Mr King's contacts with other LGO staff following my letter of 18 April, all information held by Patricia Riley concerning her handling of my complaint against [the investigator] including records of her actions and contacts and meetings with other LGO staff, records, dates and minutes of any meetings involving Mrs Riley or Mr King or any other party relating to my complaint against [the investigator] or against Northumberland County Council, all information on Mrs Riley's computer relating to either complaint and any information held in any form on the procedures and decision-making in my complaints against Northumberland County Council **and** [the investigator].'*

9. The LGO replied to this request on 3 June 2005. It took the view that the information requested was the contents of its complaints file relating to the County Council. It referred to the exemption under section 44(1) of the Freedom of Information Act 2000, which provides that:

*'Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-*

*(a) is prohibited by or under any enactment'.*

It referred the complainant to section 32(2) of the Local Government Act 1974 which stipulates that the LGO:

*'is not permitted to disclose any information obtained in the course of, or for the purposes of, the investigation of a complaint, unless he or she considers it is necessary for the purposes of the investigation (or for other very limited reasons mostly related to legal proceedings).'*

However, the LGO stated that it was prepared to release:

*'the information contained in the investigator's telephone conversations with you and his notes of telephone messages left for you on the following dates: 21 February 2005; 24 February 2005; and 7 March 2005',*

which they quoted in full. It stated that it did not propose to provide copies of various letters between the LGO and the complainant because he would already have copies of these. In this letter the LGO also relayed to the complainant his personal data which it held.

10. On 12 June 2005 the complainant requested a review of this decision, although he made it clear that he was doing so merely as a formality so that he could then approach this office. The LGO provided a response on 20 June.

### **The complainant's third request**

11. On 23 May 2005 the complainant had made a third freedom of information request for:

*'1/ The total number of complaints received by the Ombudsman during any recent 12-month period.  
2/ The number of complaints from that total which resulted in **a report being issued.**'*

In this letter he also stated that if he received a negative response he would complain to the Information Commissioner that the LGO was *'in breach of the Act and your duty to provide assistance under the Act'*, which included the LGO's *'refusal to respond to my written request of 22 April to provide me with a written copy of your publication scheme since I cannot use computers for medical reasons'*.

12. The LGO replied on 26 May 2005. It stated that:

*'we cannot provide you with this information as this is not the way we analyse our data. The FOIA gives you rights to access information in the form a public body holds it. It does not give you rights to require a body to create new information or analysis from its databases for your particular purpose'*.

The LGO pointed out that it measured its effectiveness in alternative ways than by way of the information requested by the complainant, *'such as cost per case, decisions per head of staff and times to complete cases'*, and it copied to him its business plan in which this information was detailed. It also enclosed a copy of its publication scheme, stating that the complainant had in fact never previously requested this document.

## The Investigation

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### Scope of the case

13. On 5 July 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider the following points.
  - In relation to the first part of his first request for information, he asked for clarification as to whether the LGO were entitled to withhold the information about their investigator's length of service.
  - In relation to the second and third parts of his first request, and to his third request, the complainant stated that it was totally unacceptable for the LGO to respond that it did not keep information about the number of its complaints which resulted in a report being issued, and he expressed the view that this response was obviously untrue because the LGO kept a record of the outcome of all complaints. He also complained that the LGO had falsely claimed that the information was contained in its annual report of 2003/2004.
  - In relation to his second request, the complainant complained that the LGO's response was *'derisory'* and ignored his detailed requests.
  - The complainant also complained that the LGO had been unhelpful in dealing with his case, specifically by failing to send the publication scheme, which he had initially asked for on 18 April 2005, until he had repeated the request. The complainant further complained that the LGO had failed to send him its internal complaints procedure despite his written request.

### Chronology

14. The Information Commissioner's Office wrote to the LGO on 11 July 2005, as a result of which the LGO forwarded the contents of its complaints file.
15. The Information Commissioner's Office sent further letters to the complainant and the LGO on 26 September 2006. Amongst other things, requested from the LGO a copy of relevant pages from its 2003/2004 annual report. It informed the complainant that some of the issues which he had raised could not be addressed by the Commissioner.
16. The LGO informed the Commissioner on 3 October 2006 that it was referring the matter to its legal adviser and there might therefore be some delay.
17. The Information Commissioner's Office sent a reminder to the LGO on 6 November 2006, and a further reminder on 21 November. It asked for clarification of any distinction the LGO had drawn between information held about the County Council and the internal service complaints. It also queried the LGO's interpretation of section 32(2) of the Local Government Act 1974, specifically its understanding of *'information obtained during the course of an investigation'*.

18. The LGO provided comments on 24 November 2006. It attached the requested pages from its 2003/2004 annual report.

## Analysis

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19. In relation to the complainant's third request and the second and third parts of his first request, the complainant had originally requested *'the number of complaints made to the LGO in total for the last year for which records are available'* and *'The number of complaints from that total which were formally investigated by the LGO'*. The LGO's reply on 20 April 2005 provided the complainant with its annual report for 2003/2004 containing details of complaints received. Regarding the request for the number of complaints that were *'formally investigated'*, it pointed out that this information was not recorded, but referred the complainant to the breakdown of the outcome of complaints determined in 2003/2004 which was to be found on page 27 of the report. It advised the complainant that *'the different outcomes do not equate to whether complaints were "formally investigated" or not'*, since complaints ultimately adjudged to be 'outside jurisdiction' were in a few instances subject to an abortive formal investigation; in its internal review decision dated 6 May 2005 the LGO pointed out again that *'the term "formally investigated" is not one that we use or which matches our records'*, and the summary data which was available was published in the organisation's annual report. The complainant then refined the request to *'The total number of complaints received by the Ombudsman during any recent 12-month period'* and *'The number of complaints from that total which resulted in **a report being issued.**'* On 26 May 2005 the LGO pointed out that it measured its effectiveness differently – *'such as cost per case, decisions per head of staff and times to complete cases'* – and it copied to the complainant its business plan in which this information was detailed.
20. The complainant's complaint to the Commissioner was that the requested information was not available in the 2003/2004 annual report and that the LGO must have kept a record of how many complaints resulted in a formal report being issued. Having considered the relevant section on page 27 of the annual report (*'Appendix 1(b) – Analysis of outcome of complaints determined 2003/04'*), the Commissioner has taken the view that the LGO provided as much information as it could regarding how many complaints had been 'formally' investigated. It explained in its refusal notice of 20 April 2005 why the figures which it did record – relating to outcomes – did not allow it to identify precisely how many formal investigations had been started. Furthermore, the Commissioner notes that page 27 of the 2003/2004 annual report breaks down case closures into categories where reports were issued or not issued, thereby providing the complainant with the information which he asked for in his third request. The LGO also provided the complainant with its business plan, which contained the figures which it used to measure performance. In the circumstances, the Commissioner has taken the view that the LGO provided the complainant with the information which he had asked for in his third request and the second and third parts of his first request to the extent that it was able.

## Exemptions

### Section 40 and section 36

21. In the first part of his initial freedom of information request, the complainant asked for *'The length of time [the investigator] has been employed as an Investigator by the LGO'*. The LGO's response on 20 April 2005 was that:

*'this is "personal data" and is covered by an exemption from disclosure under section 40 of the Freedom of Information Act 2000'.*

In its response on 24 November 2006 to a query from the Commissioner, the LGO clarified that the second Data Protection Principle applied to this case. This states:

*'Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.'*

The LGO explained that:

*'The Commission holds data on its employees for purposes related to their employment rights and benefits. I enclose a copy of the guidance we provide to our staff concerning this matter.'*

That guidance stated:

*'We sometimes receive requests about individual members of staff... In these circumstances, we will only disclose the following information:*

- *the person's name and job title;*
- *their work address and telephone number;*
- *the qualifications required for the job (by providing person specification and job description for the post) and the salary band for the post.*

*We will not disclose any other personal details, for example, how long the person has worked at the Commission, or information relating to a member of staff's work performance, or their qualifications.'*

22. In light of the explanation from the LGO, the Commissioner considers that there is merit in the LGO's argument that it held information about the length of the investigator's service for purposes related to his employment rights and benefits, and that it would be a breach of the second Data Protection Principle were it to use that information for another purpose (such as giving a complainant details of the investigator's caseworking experience). Furthermore, the Commissioner notes that the guidance given to employees of the LGO specifically stipulates that such information will not be disclosed to other persons (such as complainants), thereby creating an expectation on the part of the investigator that this information would not be so disclosed. In the view of the Commissioner, disclosure of the information would therefore breach the first Data Protection Principle, which states that:

*'Personal data shall be processed fairly and lawfully...'*

The Commissioner considers that in this case it would be unfair for the LGO to disclose information about an employee when it had previously given an explicit written assurance that it would not be so disclosed.

23. For these reasons, the Commissioner has decided that it was reasonable for the LGO to have maintained the exemption under section 40 of the Act in relation to the complainant's request for details of the investigator's length of service.
24. In its review on 6 May 2005, the LGO added that section 36(2)(c) (prejudice to the effective conduct of public affairs) also applied to the request for the investigator's length of service. Since the Commissioner has decided that the exemption under section 40 applies to this element of the requested information, he does not consider it necessary to reach any conclusion regarding the LGO's application of the exemption under section 36.

#### Section 44

25. In his second freedom of information request on 22 May 2005 the complainant asked for:

*'All information held by the Ombudsman in any form relating to [the investigator's] handling of my case',*

and for:

*'All information held by the Ombudsman in any form relating to my complaint against [the investigator]'.*

In its refusal notice of 3 June 2005 the LGO took the view that the information requested amounted to the contents of the file it had opened for its investigation of the County Council ('the complaints file'). It referred to the exemption under section 44(1) of the Act, which provides that:

*'Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it -*

*(a) is prohibited by or under any enactment'.*

It identified the relevant enactment as being section 32(2) of the Local Government Act 1974 which stipulates that the LGO:

*'is not permitted to disclose any information obtained in the course of, or for the purposes of, the investigation of a complaint, unless he or she considers it is necessary for the purposes of the investigation (or for other very limited reasons mostly related to legal proceedings)'.*

However, information which the LGO was prepared to release was:

- *'the information contained in the investigator's telephone conversations with you [the complainant] and his notes of telephone messages left for*



*you on the following dates: 21 February 2005; 24 February 2005; and 7 March 2005',*

- the complainant's personal data which it held;
- various letters between the LGO and complainant, although it did not propose to provide copies because the complainant would already have them.

26. In relation to the remaining information in its complaints file, the LGO clarified the matter further in its comments to the Commissioner on 24 November 2006:

*'We consider all the records generated by an investigation to be covered by s32(2) irrespective of whether they are created by our office or gathered from an external source. We do not maintain a separate record of how a particular investigation was conducted; this can be ascertained, in the most part, by reading through the case file itself. Investigators are generally required to follow the procedures set out in our investigator handbook. This is an on-line document on our staff intranet. It does not convert into a printed document but, if Mr Gilbert wishes, we could create a CD copy of this general guidance which can be sent to him.*

*You may feel that Mr Gilbert's complaint about the investigator would be a separate record and so would not be covered by the s44 exemption. In this instance there is no separate record. The substance of Mr Gilbert's complaint about the investigator...is that [he] did not deal competently with Mr Gilbert's complaint...and so we have judged this to be part of the case file. In any event, all the parts of the case file which relate to the allegation of incompetence comprise the correspondence between Mr Gilbert and the Commission's staff and so Mr Gilbert already has this material.'*

27. The Commissioner takes the view that information which draws upon, or mentions details of, the nature of a complaint submitted to the LGO constitutes *'information obtained in the course of, or for the purposes of an investigation'* and is therefore exempt under section 44. This includes correspondence and telephone attendance notes between the LGO, the complainant and third parties, and investigators' notes, insofar as it relates to information obtained for the purpose of the investigation. However, there may be some other classes of information held by the LGO which do not fall within this statutory bar: generic information about its investigative procedures; procedural information about how the LGO has conducted a particular investigation; information created during the investigation of internal service complaints unrelated to that obtained during the original investigation; and the complainant's own personal data.

28. The Commissioner has considered the information in the LGO's complaints file and the comments made by the complainant and the LGO. In his view the complaints file contains some previously undisclosed filenotes – identified in the accompanying letter – between LGO staff members which contain information which was not *'for the purposes of'* the investigation into the original complaint about the County Council, but instead relate to the complainant's internal service complaint. Furthermore, the Commissioner considers that this information does

not include anything that was '*obtained in the course of*' that original investigation. Since he takes the view that section 44 does not apply, this information should therefore be disclosed.

## The Decision

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29. 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 first part of the first request was properly withheld by the LGO under section 40 of the Act;
- the LGO complied with the second and third parts of the complainant's first request, and his third request, by providing the requested information to the extent that it was able.

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

- there was information related to the complainant's second request which was improperly withheld by the LGO under the section 44 exemption.

## Steps Required

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30. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- the LGO should disclose to the complainant the information identified in the accompanying letter.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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31. 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

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32. 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  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto: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 23<sup>rd</sup> day of May 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
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SK9 5AF**