

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 November 2010

Public Authority: Brent Council
Address: Town Hall
Forty Lane
Wembley
Middlesex
HA9 9HD

Summary

The complainant requested a copy of a report into the alleged financial mismanagement by staff at a specified school. Brent Council (the 'Council') refused the request on the basis of section 31(1)(g) with respect to 31(2)(b) and section 40. At its internal review, the Council considered that sections 31(1)(b) and (c) applied, while also maintaining its reliance on section 31(1)(g) by virtue of 31(2)(b). With the exception of a limited amount of information that was disclosed during his investigation, the Commissioner is satisfied that section 31(1)(b) of the Freedom of Information Act 2000 is engaged. Further, the Commissioner considers that the public interest favours maintaining the exemption. He has therefore not gone on to consider the other exemptions cited by the Council. The Commissioner, however, does find that the Council breached sections 1(1)(b) and 10(1) by its handling of the request.

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. On 30 September 2009, the complainant emailed Brent Council (the 'Council') to request the following information:

"I would like to have, under the FOI, as much as it is possible of the report into the investigation of serious 'financial mismanagement' by four senior managers at Copland School, namely [A], Headteacher, [B], Deputy Headteacher, [C], Bursar and [D], HR Manager."

3. The Council responded to the request on 27 October 2009. It informed the complainant that it was refusing to release the report on the grounds that the exemptions provided by section 31(2)(b) and section 40 applied. By way of explanation, the Council stated that:

"These exemptions apply because disclosure of the report or any part of it would be prejudicial to any proceedings concerning the actions of individuals referred to in the report. It would not be in the public interest for the report to be disclosed before such hearings had been completed. Individuals subject to such hearings might consider that persons making decisions would be unduly influenced by the report being made public. In addition the majority of the report contains personal information."

4. On 16 November 2009, the complainant asked the Council to review its decision. As well as referring to the significant public interest in the information, the complainant also argued that the Council had not considered fully the following factors:

- (i) All the people facing disciplinary charges had either been dismissed or resigned.
- (ii) The possibility that personal data could be redacted from the report.
- (iii) The Council should not have taken a blanket approach when considering the report but should, instead, have assessed whether specific parts of the report could be released.

5. The Council responded with the findings of its review on 26 March 2010. No explanation was given for the length of time it had taken for the Council to respond. The Council stated that, upon further analysis, it considered that sections 31(1)(b) and (c) applied, as well as

maintaining its reliance on section 31(2)(b). It also indicated that the report contained highly sensitive personal information, although no specific reference was made to section 40 at this time.

The Investigation

Scope of the case

6. On 26 April 2010 the complainant contacted the Commissioner to complain about the Council's refusal of his information request.
7. As part of his submissions, the complainant identified the amount of information already in the public domain concerning the alleged financial mismanagement at the school. The complainant therefore claimed that the release of the report could not materially affect the ability of any body to carry out an investigation.

Chronology

8. Between 16 June 2010 and 1 October 2010, the Commissioner asked for, and was provided with, copies of the withheld information from the Council and clarification of the status of the exemptions the Council was seeking to rely on.
9. On 7 October 2010, the complainant emailed the Commissioner a copy of a report published in September 2010 by the Audit Commission, entitled "*Review of [Brent] Council arrangements in respect of Copland School.*"
10. On 21 October 2010, the Commissioner contacted the Council to ask that it release certain information which formed part of the appendices to the report; the Council previously indicating that it had no objection to the release of this information. This was provided to the complainant on 22 October 2010.

Findings of fact

11. Following suggestions of financial mismanagement at a specified school by a whistleblower, an internal investigation was commenced by the Council. This was completed in October 2009. Although not material to the decision of the Commissioner – who is only able to consider the circumstances of a case as they stood at the time of a request – it has

since been confirmed that the Council has referred matters to the police for further consideration.¹

12. The Commissioner notes that the report itself was not compiled on the basis that prosecution proceedings may be taken but, instead, was meant to inform a decision as to whether or not disciplinary action was appropriate. The author of the report, however, does refer to the fact that an investigation was ongoing which would determine whether criminal and/or civil recovery action should be considered.

Analysis

Procedural Matters

13. The legal provisions relevant to the decision are set out in the Legal Annex to the Decision Notice.

Exemptions

The scope of information considered by the Commissioner

14. The Commissioner notes that the Council originally discounted the appendices to its investigative report from its consideration of the request on the basis that they were not directly referred to by the complainant.
15. The Commissioner, however, considers it reasonable for the complainant to expect that, by asking for a report generally as opposed to a specific part of that report, his request would include the appendices which have directly fed into the report's findings. The Commissioner has therefore based his decision on the whole of the report, including the appendices, rather than only examining the body of the report itself.
16. During the Commissioner's investigation, the Council has confirmed that the appendices to the report would also be subject to the exemption provided by section 31(1)(b), as well as sections 31(1)(c), 31(1)(g) by virtue of section 31(2)(b) and, in places, section 40(2).

¹ Audit Commission - *Review of Council arrangements in respect of Copland School*, para 8.
<http://democracy.brent.gov.uk/mgConvert2PDF.aspx?ID=3235>

Section 31(1)(b) – the apprehension or prosecution of offenders

17. Section 31(1)(b) section states:

“Information which is not exempt by virtue of section 30 is exempt information if its disclosure would, or would be likely to, prejudice –

...

(b) the apprehension or prosecution of offenders

18. Section 31(1)(b) constitutes both a prejudice based and qualified exemption. Therefore, for it to be applied correctly, it is firstly necessary for a public authority to demonstrate that there would be at least a real likelihood that disclosure would prejudice the interest set out at section 31(1). If the likelihood of prejudice can be demonstrated, a public authority would then have to find that the public interest in maintaining the exemption would outweigh the public interest in disclosure in order to justify withholding the requested information.

19. The test of prejudice and the public interest test are addressed in turn by the Commissioner.

Would the release of the requested information be likely to prejudice the apprehension or prosecution of offenders?

20. In *Hogan v Information Commissioner and Oxford City Council [EA/2005/0026 & EA/2005/0030]*, the Information Tribunal stated that “The application of the ‘prejudice’ test should be considered as involving a number of steps. First there is a need to identify the applicable interest(s) within the relevant exemption...Second, the nature of the ‘prejudice’ being claimed must be considered...A third step for the decision-maker concerns the likelihood of occurrence of the prejudice.”

21. The Council has argued that the prejudice predicted is relevant to the exemption being relied upon for the following reasons:

- a) The individuals accused could use the information contained in the report either to discredit statements or to compile a defence.
- b) The press, which has been used extensively in the past, could publish part of the information which may come to affect any future trial.

- c) The potential defendants could argue against any prosecution by claiming their human rights had been impinged, particularly in their right to a fair hearing.
22. The Commissioner is aware that at the time the request was made no final decision had been made in relation to whether civil or criminal proceedings should be taken against any member of the staff at the school in question. Nevertheless, the Commissioner would accept that such action was being considered at the time of the request and, accordingly, there was a real possibility that this action would take place.
23. The Commissioner is therefore satisfied that all three parts of the Council's arguments are relevant to the exemption provided by section 31(1)(b), particularly in relation to the prosecution of offenders.
24. The Commissioner has therefore gone on to consider whether there may reasonably be judged a causal relationship between the disclosure of the report in question and the prejudice predicted by the Council. Importantly, the Commissioner is mindful that the identified prejudice must not be trivial, but must instead be detrimental or damaging.
25. The Commissioner considers that the arguments presented at a) – c) all share a common theme. Yet, the Commissioner is not persuaded that a) and b) in themselves demonstrate that the predicted prejudice would be likely to occur.
26. In regards to a), the Commissioner does not consider that the Council has explained to a sufficient degree how the issuing of statements by the potential defendants could affect prosecution proceedings. Similarly, concerning b), the Commissioner has not been presented with any arguments that clearly define a causal link between the potential publication of the information contained in the report and the impact that this may have on the apprehension or prosecution of offenders.
27. The Commissioner accepts, however, that a detrimental prejudice may occur where a defendant could claim that their right to a fair hearing had been impeded because of information already in the public domain. Therefore, the Commissioner is of the view that the argument presented in c) would describe a causal link between potential publication and the factors stated in the exemption.
28. The Council has not explicitly stated whether disclosure would or would be likely to result in the prejudice identified above. The Commissioner has therefore found it appropriate to apply the lesser test, specifically

that the exemption will be engaged if disclosure would be likely to cause the prejudice described in section 31(1)(b) of the Act.

29. The nature of 'would be likely to prejudice' was also considered by the Information Tribunal in *John Connor Press Associates Ltd v Information Commissioner* (EA/2005/0005). Drawing on the judgement of Mr Justice Munby in the High Court decision *R (on the application of Lord) v Secretary of State for the Home Office* [2003], the Tribunal considered that for this level of prejudice to apply:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."

30. As noted, the Commissioner is aware that the alleged financial mismanagement at the school has already been the subject of media attention. Accordingly, the Commissioner has borne in mind that a number of the issues explored in the report would have been touched on as part of the media coverage.
31. However, the Commissioner considers it likely that publication of previously undisclosed or unconfirmed information would result in further speculation, the result of which may lead to claims of bias in any subsequent proceedings. For this reason, the Commissioner considers that there is a real and significant risk of the prejudice set out at c) occurring

Public interest arguments in favour of disclosing the requested information

32. The Commissioner appreciates that with any allegations of financial mismanagement and misconduct at a public authority, there will be an inevitable public interest in understanding the extent of the issues concerned. Ultimately, a school has a moral, as well as fiduciary, obligation to the community it serves and represents. This interest, however, would be heightened in this case because of the amount of public funds involved and the media attention given to the allegations.
33. It is evident, for example, that a number of media sites including the BBC have followed the story since a whistleblower revealed what was considered to be an excessive bonus culture.
34. In addition, the Commissioner would agree with the complainant that legitimate public concerns will have arisen because the irregularities at the school had not been identified at an earlier stage. The Commissioner understands that the media speculation may have

shaken the public's faith in the monitoring systems put in place by both the school itself and the local authority which oversees the school.

35. In the conclusion to its report on the Council's handling of the allegations, the Audit Commission explained that:

"37. Even though foundation schools [of which the school in question is one] have a high level of autonomy, the Council retains a responsibility over the proper administration of schools' affairs. This includes ensuring that satisfactory systems of internal control are in place and there is an effective internal audit."

36. By disclosing the report, the Commissioner considers that members of the public could come to know how the lapses in the monitoring system had come about and what steps were being considered to remedy the financial mismanagement. In essence, the release of the information could help assuage the concerns of the public through ensuring that that the workings of the authority were transparent.

Public interest arguments in favour of maintaining the exemption

37. The Commissioner considers that there will always be strong grounds for protecting information that may result in the prosecution of offenders. This view was supported by the Information Tribunal in the case of *Toms v Information Commissioner* (EA/2005/0027); the Tribunal stating:

"[freedom of information] should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witness and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt."

38. As set out at paragraph 22, the Commissioner recognises that no formal prosecution proceedings were being pursued at the time of the request. However, given the real possibility that proceedings would be undertaken, the Commissioner considers that the Council has a strong case for ensuring that, to paraphrase the Tribunal, the prejudicing of effective law enforcement could be avoided and the integrity of the criminal court preserved.
39. The Information Tribunal similarly reflected on the public interest associated with investigative proceedings in *Department for Trade &*

Industry v Information Commissioner (EA/2006/0007). At paragraph 57, the Tribunal commented:

"...the Act has recognised that there is a public interest in recognising the importance of the proper conduct of investigative processes and procedures carried out by public authorities, particularly those which might lead to criminal proceedings, and moreover that in relation to such procedures and possible proceedings, the maintaining of confidential sources must be respected."

40. Significantly, the Commissioner considers that the public interest arguments for disclosure are based on the more general principles of accountability and transparency. In contrast, there would appear to be a specific, and considerable, public interest in allowing the potential prosecution of offenders to take place without being impeded. This is because for society to function effectively there must be confidence that any alleged transgressions can be freely considered by the judiciary and, where necessary, any offenders brought to account.
41. In this vein, the Commissioner has weighed up the benefit of disclosure against the potential harm that disclosure may cause. The Commissioner considers that, given the media speculation, the release of the report could help secure greater public faith in the effectiveness of the authority. However, the Commissioner considers that this interest is significantly outweighed by the possibility that any future prosecution may be jeopardised and therefore the judicial process undermined.
42. In considering the public interest, the Commissioner has also borne in mind the arguments presented by the complainant at paragraph 4.
43. Regarding (i), the Commissioner is of the view that whether or not any of the individuals at the centre of the allegations had resigned or been dismissed would not affect whether these same individuals could be subject to prosecution. The Commissioner does not therefore consider that (i) would add any weight in favour of disclosure.
44. In relation to (ii) and (iii), the Commissioner considers that, while certain parts of the report may to some extent have been reported in the media, not all of this information has been substantiated. Similarly, the report is driven by an author who has put forward his own views and recommendations. The Commissioner does not therefore consider it possible to safely predict that the release of a redacted version of the report would not prejudice any subsequent prosecution.

Balance of the public interest arguments

45. As demonstrated above, the Commissioner is satisfied that there are strong grounds for maintaining the confidence of information which may feed into the prosecution of offenders. On this basis, the Commissioner does not consider that the more generalised arguments for disclosure, based on the principles of accountability and transparency, would outweigh the public interest in maintaining the application of section 31(1)(b).
46. As the Commissioner has found that section 31(1)(b) is engaged and that the public interest weighs in favour of maintaining the exemption, he has not gone on to consider the other exemptions cited by the Council.

Procedural Matters

Sections 1 and 10 – the provision of information

47. 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.”*

48. Section 10(1) provides

“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.”

49. With reference to paragraph 10, certain appendices to the withheld report were provided to the complainant during the course of the Commissioner’s investigation.
50. As this information was not disclosed within the statutory time-limit of 20 working days following receipt of the request, the Commissioner has determined that the Council breached sections 1(1)(b) and 10(1) of the Act.

The Decision

51. The Commissioner's decision is that, with the exception of a limited amount of information disclosed during the course of his investigation, the Council correctly withheld the requested report under section 31(1)(b).
52. However, the Commissioner finds that by failing to disclose the information referred to above within the statutory time limit, the Council breached sections 1(1)(b) and 10(1).

Steps Required

53. The Commissioner requires no steps to be taken.

Other matters

54. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint.

As he has made clear in his *'Good Practice No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

The Commissioner is concerned that in this case, it took well over the 40 day period for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

55. 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

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.

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 17th day of November 2010

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

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

Legal Annex

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.

The exemption for law enforcement

Section 31(1) provides that –

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

Section 31(2) provides that –

The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

Section 31(3) provides that –

The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

The exemption for personal information

Section 40(1) provides that –

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.

Section 40(2) provides that –

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.

Section 40(3) provides that –

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.