

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 May 2011

Public Authority: Barnsley Metropolitan Borough Council
Address: Springfield House
Springfield Street
Barnsley
S70 6HH

Summary

The complainant requested information about the payment received by the public authority's Returning Officer and deputy Returning Officers in return for their performance of election duties. This was refused by the public authority but the refusal notice was unsatisfactory. The complainant was subsequently referred to the information, available on the Ministry of Justice website. The Commissioner finds breaches of section 1(1)(a), section 17(1) and section 17(7) of the Act but requires no action to be taken.

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 14 May 2010 the complainant wrote to Barnsley Metropolitan Borough Council (BMBC), requesting:

"[...] please inform me of the payment details received by the Council's Returning Officer and Deputy Returning Officer in return for their performance of election duties."

3. BMBC replied on 16 June 2010, stating:

"Unfortunately I am unable to provide the information you have requested as the Returning Officer is a separate entity to the Council and this information would need to be requested from the Electoral Commission."

4. The complainant was not offered an internal review and was not informed of his right to bring a complaint to the Information Commissioner.
5. The Commissioner contacted the public authority, which agreed that an internal review would not be necessary. This complaint has therefore been accepted in the absence of an internal review.

The Investigation

Scope of the case

6. On 16 June 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 response was not received within 20 working days;
 - His request has been refused;
 - He was not offered an internal review.
7. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The online location of the requested information was disclosed to the complainant, who obtained a copy.

Chronology

8. The Commissioner corresponded with both parties at intervals, between August 2010 and February 2011.
9. On 29 October 2010 the public authority acknowledged the deficiencies in its initial response and explained that this was, in part, due to the involvement of an inexperienced member of staff who gave advice which was not 'entirely accurate'. It explained that the Returning Officer is acting in a separate statutory capacity to that of his role as an officer of the council and he is paid according to a schedule published in a

statutory instrument 'fees order' available from the Ministry of Justice website.

10. It also explained that Deputy Returning Officers receive no specific payment for the performance of election duties, over and above the normal remuneration they receive in relation to their contract of employment as employees of the council. Consequently, no information is held by it in this regard.
11. The public authority's Returning Officer confirmed that he had no objection to the requested information being disclosed, and the public authority offered to respond to the complainant with the necessary link to the fees order and also to apologise directly to him for the deficiencies in its handling of his request to that point.
12. On 24 December 2010 BMBC provided the complainant with a link to the statutory fees order¹ (referred to above) which sets out the fees payable to Returning Officers. It was explained to the complainant that BMBC's Borough Secretary is the Returning Officer for Barnsley Central and Barnsley East constituencies.
13. The Commissioner corresponded further with the complainant, who indicated that he was not satisfied with the response provided to him. He commented, among other matters, that there is a third constituency within Barnsley which was not referred to in BMBC's response.

Findings of fact

14. A Returning Officer is exercising statutory duties under electoral legislation and is not acting as an officer of the council when undertaking that role. He is paid separately for that function, by the Ministry of Justice, according to a schedule set out in the statutory fees order described above.

Analysis

Substantive Procedural Matters

Section 1

15. The public authority's initial response appears to have been made 'in the normal course of business' and makes no attempt to comply with the requirements of the Act. BMBC fails to confirm or deny that information

¹ See <http://www.legislation.gov.uk/ukxi/2010/830/schedule/1/made>

is held, and fails to cite any exemption, or substantive procedural reason under the Act for its refusal to provide the requested information.

16. Its response is capable of being interpreted as a denial that BMBC holds the requested information. In discussions with the Commissioner, the public authority expressed its view that the correct formal response to the request ought to have been to issue a refusal under section 21 of the Act, on the grounds that the information was reasonably accessible to the applicant by other means, and to have provided him with the link to the fees order on the Ministry of Justice website.
17. The Commissioner observes that information cannot be 'refused' if it is 'not held' and he requested clarification that the information was, in fact, held by the public authority. It was subsequently confirmed that BMBC holds a copy of the fees order, a Statutory Instrument, for its own reference purposes.
18. With regard to that element of the complainant's request relating to payments to the council's deputy Returning Officer, the council has explained that this role is covered within the contract of employment of the relevant staff member, who receives no specific payment for his duties as deputy Returning Officer. Consequently, the Commissioner accepts that no information will be held in relation to this specific element of the request.
19. BMBC has also explained that there are in fact four constituencies within the Barnsley area, the remaining two being 'Wentworth and Dearne', and 'Penistone and Stocksbridge', but that the Returning Officers for these constituencies are the Chief Executives of Rotherham, and Sheffield councils, respectively.
20. The Commissioner is satisfied that the public authority holds information in relation to the fees paid to the council's Returning Officer in the form of a reference copy of the fees order. This information was available to the complainant when BMBC provided him with a link to the appropriate website, however it was not made clear to the complainant whether BMBC was confirming or denying that this information was held by it. Further, while the response explained that the council's Borough Secretary and Solicitor acts as Returning Officer for two named constituencies, it was not made clear that no other constituencies are covered by the council's Returning Officer.
21. In failing to confirm or deny that information was held about payments to its Returning Officer and deputy Returning Officer, the public authority has breached section 1(1)(a) of the Act.

Exemptions

Section 21

22. The public authority only raised the subject of the provisions of section 21 of the Act during the Commissioner's investigation and did not issue a notice stating that it relied on this exemption, in its correspondence with the complainant. It provided the complainant with a link to the requested information on the Ministry of Justice website, during the Commissioner's investigation.
23. The Commissioner is aware that, following the public authority's provision of this link, the complainant has obtained a copy of the Fees Order. The Commissioner is satisfied that the requested information is available for download from the Ministry of Justice website (and would have been at the time of the request) and that this is reasonably accessible to the complainant. He therefore finds that section 21 of the Act applies to the requested information.

Procedural Requirements

Section 17

24. The public authority's initial response constitutes a refusal of the complainant's request, however the grounds for its refusal are unclear and could be interpreted as a statement that the information is not held by it. BMBC subsequently confirmed that the information is held by it and expressed its view, in correspondence with the Commissioner, that the information should have been refused under the provisions of section 21 of the Act, and a link to the information provided to the complainant.
25. The Commissioner finds that in failing to explain to the complainant its reasons for refusing the requested information, the public authority has breached section 17(1)(a), (b) and (c) of the Act. By its failure to inform the complainant of any procedure provided by it for dealing with a complaint, and its failure to inform the complainant of his right to submit an appeal to the Information Commissioner, the public authority has also breached section 17(7)(a) and (b).

The Decision

26. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

- By its failure to confirm or deny information was held by it, the public authority breached section 1(1)(a) of the Act.
- By failing to provide the complainant with a notice stating that the requested information was exempt, specifying the exemption in question and the reasons why it applied, the public authority breached section 17(1)(a), (b) and (c) of the Act.
- By failing to give particulars of any complaints procedure provided by the public authority, and by failing to inform the complainant of his right of appeal to the Information Commissioner, the public authority breached section 17(7)(a) and (b) of the Act.

Steps Required

27. The Commissioner requires no steps to be taken.

Right of Appeal

28. 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

29. 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.
30. 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 16th day of May 2011

Signed

**Andrew White
Group Manager
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."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

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(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - 1. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - 2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate

notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

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

- (a) 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, and
- (b) contain particulars of the right conferred by section 50."

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”