

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 May 2011

Public Authority: Wolverhampton City Council
Address: Office of the Chief Executive
Civic Centre
St Peter's Square
Wolverhampton
WV1 1SH

Summary

The complainant asked Wolverhampton City Council ("the Council") for a copy of an internal audit report relating to a Council-owned property, the Tettenhall Institute. The Council relied on the exemption under section 30(2)(a)(iii) and considered that the public interest favoured maintaining the exemption. The Commissioner considered that the Council's arguments were not sufficient to enable him to conclude that the exemption had been correctly applied. He therefore requires the Council to disclose a copy of the report and he has found the Council in breach of section 10(1), 1(1)(b), 17(1) and 17(1)(c) of the Freedom of Information Act 2000 ("the FOIA").

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 FOIA. This Notice sets out his decision.

The Request

2. On 30 November 2009, the complainant wrote to the Council and requested information in the following terms:

"An investigation has recently been completed by the Audit Division into the financial activities of The Wightwick & Regis Enterprise (WREN), with regard to their conduct at The Institute in Tettenhall Wood.

I am a local resident with a particular interest in this community centre & would therefore like to apply for a copy of this report, in accordance with the Freedom of Information Act 2005 [sic]".

3. On 31 December 2009, the Council replied citing the exemption under section 31 of the FOIA. The Council did not specify which subsections applied and it did not explain why the exemption applied to the particular report. It also failed to consider the public interest test associated with this exemption.
4. On 10 January 2010, the complainant sent a letter asking for an internal review. The Council acknowledged the request for an internal review on 12 January 2010 but subsequently failed to respond to a number of communications from the complainant and the Commissioner asking for a copy of the Council's internal review response. The Commissioner was not provided with a copy of the internal review until 19 January 2011. The internal review was dated 19 April 2010. It was not clear whether this had ever been sent to the complainant or if it had, why the Council had failed to reply to the subsequent correspondence indicating that the internal review had not been received.
5. In the Council's internal review, it said that the exemption it was originally relying on was section 31(1)(g). However, the Council said that it was now of the view that a more appropriate exemption would be section 30(2)(a)(iii). It also said that it was of the view that the public interest favoured maintaining the exemption.

The Investigation

Scope of the case

6. On 7 September 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 whether the Council had correctly refused to provide him with the information he had requested.

Chronology

7. The Commissioner wrote to the Council on 25 January 2011 following a telephone call in which it was confirmed that the exemption that the

Council was seeking to reply on was section 30(2)(a)(iii). The Commissioner asked for information that he required to conduct his investigation.

8. When the deadline for a response to the Commissioner's letter had elapsed, the Commissioner telephoned the Council on 24 February 2011 and was informed that the Council had decided to disclose the withheld report to the complainant outside the terms of the FOIA because it accepted that the complainant had a particular interest in the matter (for clarity, a disclosure made under the FOIA is a public disclosure). The Council indicated that the disclosure would be made the following week.
9. When the Council failed to make the proposed disclosure and was unable to indicate when it would be able to do so, the Commissioner wrote to the Council on 14 March 2011. He explained that because of the passage of time, the Commissioner had been left with no alternative but to resume his investigation to consider whether the report had been correctly withheld under the terms of the FOIA. He said that he required the information which had originally been asked for on 25 January 2011. He asked the Council to ensure that a full response was provided by 29 March 2011 and referred to his powers to issue an Information Notice under section 51 of the FOIA.
10. The Commissioner made various unsuccessful attempts to contact the Council by telephone to ascertain whether it intended to respond to the letter on time and to discuss any problems that the Council may be experiencing. However, the Commissioner's calls were not returned and on 29 March 2011, the Commissioner informed the Council of his intention to issue an Information Notice. Later that day, the Council telephoned the Commissioner and subsequently provided a copy of its response to the Commissioner's letter dated 25 January 2011. This included a copy of the withheld report as well as arguments supporting its position that the report had been correctly withheld under the FOIA. The Council pointed out that this response was not complete however and it said it would provide the outstanding information by the end of the week.
11. On 1 April 2011, the Commissioner telephoned the Council to enquire about the outstanding information. The Council confirmed that it would provide this to the Commissioner on the same day and that it would also write to the complainant to provide a copy of the withheld report to him outside the terms of the FOIA at the same time. It said that it would also copy the Commissioner into this correspondence on the same day.
12. On 19 April 2011, the Council provided further arguments to support its application of section 30.

13. On 20 April 2011, the Council provided the Commissioner with a copy of a letter it had sent to the complainant. This letter showed that the Council had disclosed the withheld report to the complainant on a discretionary basis.

Analysis

Substantive Procedural Matters

Exemption – section 30(2)(a)(iii)

14. This exemption provides that information held by a public authority is exempt if it was obtained or recorded by the authority for the purposes of its functions relating to investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment and it relates to the obtaining of information from confidential sources. The Council said that the relevant purpose specified in section 31(2) is point (b) which is for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
15. In the Council's initial response, it did not offer any rationale for relying on this exemption. It simply quoted the various provisions of the exemption without specifying which subsections were relevant. In the internal review, the Council sought to rely on section 30(2)(a)(iii). It said that the work that its Audit Service undertakes is often confidential and it involves the consideration of allegations made against organisations or individuals which could be damaging to their reputation.
16. The Commissioner asked the Council to elaborate upon its reasoning for relying on this exemption in this particular case and he referred to his published guidance. In particular, as the authority appeared to be arguing that the investigation had been conducted using powers conferred by an enactment, he asked the authority to specify the enactment in question. When the authority replied, it said that the relevant legislation governing the work of its internal audit service is the Accounts and Audit (Amendment)(England) Regulations 2006. It quoted regulation 6 of the regulations as follows:

"(1) A relevant body shall maintain an adequate and effective system of internal audit of its accounting records and of its system of internal control in accordance with the proper practices in relation to internal control.

(2) Any office or member of a relevant body shall, if the body requires

–

(a) make available such documents of the body which relate to its accounting and other records as appear to that body to be necessary for the purpose of the audit; and

(b) supply the body with such information and explanation as that body considers necessary for that purpose”.

17. The Commissioner’s guidance on the exemption states that information described in section 30 is only exempt where the public authority has a duty, or a power, to carry out investigations or has a power to conduct the proceedings described. Public authorities relying on the exemption need to be aware of the legal basis of any investigations or prosecutions which they carry out.
18. The Commissioner notes that the authority did not seek to discover which enactment might be relevant until a late stage and it did not provide these details to the Commissioner until 19 April 2011. When it did provide the details, it unfortunately made no attempt to put the legislation into its appropriate context or describe how the legislation applied in the circumstances of this case. For example, the Commissioner notes that the Council provided no description of how the Wightwick and Regis Enterprise Network (“WREN”) constituted a “relevant body”. He also noted that there is no evidence that the Council is the actual enforcement authority, with the power to conduct the investigation. The Council advised the Commissioner that it had been invited to conduct the investigation by WREN following a letter of complaint that was received by WREN. The investigation therefore took place on a voluntary basis. There was no indication of what would be the recourse of the Council in the event of non-compliance from WREN.
19. The Commissioner also pointed out that the exemption would only be engaged if it relates to the obtaining of information from confidential sources. “Confidential” in this section has a wider, more general, meaning that in other parts of the FOIA and is not limited to circumstances where a breach of confidence could result in civil action.
20. The Commissioner explained to the Council that the exemption is principally designed to protect the identities of confidential sources so that those sources are not discouraged from approaching investigative bodies to inform on criminal or improper acts. The Commissioner pointed out that it is important to note that the exemption applies to the general process by which information is obtained from confidential sources and does not directly apply to the information supplied by the source. He explained that information that will be exempt under this

section might include the methods by which criminal intelligence is gathered from confidential sources which may help the development of either current investigations or those that have not yet been launched. There may be occasions when the information identifies, either directly or indirectly, the source of the information. Confidential sources will include witnesses who do not wish to be identified and police informers.

21. In its reply, the Council made a number of general statements regarding the confidentiality of the report. It said that the report had been classified as confidential and, at the time of the request, even WREN had not seen the report. It said that it was often necessary to keep audit investigations confidential because of the damage that could be caused to the reputation of individuals and organisations. It said the report was prepared in "confidential conditions" using "information from confidential sources". Unfortunately, the Council did not identify the confidential sources. If the authority meant to refer to members of the organisation under investigation, this was not clear. It was also not clear, it that was the case, precisely what information was obtained from them in confidence, how the expectation of confidentiality had been established and why it still applied at the time of the request, once the report had been completed. The authority provided no evidence or argument to the Commissioner to indicate that it had discussed the issue of its obligations under the FOIA with WREN when it was asked to complete the report. Similarly, it provided no evidence or argument to indicate that it had consulted WREN about its views on disclosure following the request from the complainant.
22. In view of the above, the Commissioner decided that the authority had not demonstrated that the exemption was engaged in the circumstances of this case. The Commissioner did not therefore find it necessary to consider the public interest test associated with this exemption.

Procedural Requirements

23. When the Council responded to the request, it failed to specify the exemption upon which it later relied, section 30(2)(a)(iii). This was a breach of section 17(1) of the FOIA because this should have been cited within 20 working days.
24. In its internal review, the Council did specify that it was seeking to rely on section 30(2)(a)(iii) but it still failed to adequately explain why the exemption applied. The Commissioner therefore finds a breach of section 17(1)(c) of the FOIA.

25. As the Council did not adequately justify its reliance on the exemption, the Commissioner finds that it breached section 10(1) and 1(1)(b) of the FOIA for failing to disclose the information within 20 working days of the request.

The Decision

26. The Commissioner's decision is that the Council did not deal with the request for information in accordance with the FOIA for the following reasons:
- It breached section 17(1) for failing to rely upon section 30(2)(a)(iii) within 20 working days.
 - It breached section 17(1)(c) of the FOIA because it still had not adequately explained why the exemption applied by the date of its internal review.
 - It breached section 10(1) and 1(1)(b) of the FOIA for failing to disclose the information when it did not demonstrate that it was exempt.

Steps Required

27. The Commissioner requires the public authority to take the following steps to ensure compliance with the FOIA:
- Disclose a copy of the withheld audit report to the complainant under the FOIA.
28. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

29. 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.

Other matters

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

Internal review

31. 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 Guidance No 5'*, published in February 2007, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, 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.
32. The Commissioner was very concerned about the way in which the Council handled its requirement to conduct an internal review in this case. The Council's review is dated 19 April 2010 but it is not clear whether it was ever sent to the complainant. It is clear however that the complainant did not receive a copy of the internal review and the authority did not reply to multiple reminders from the complainant to provide one. The Council also failed to reply to the Commissioner's initial enquiry regarding the internal review. As a result, the complainant did not obtain a copy of the Council's internal review until 19 January 2011. Furthermore, when the internal review was provided, it still did not contain adequate rationale for relying on the particular exemption and this was particularly important as no rationale had been provided in the authority's initial response. It is clear that the authority provided a very poor level of service on this occasion. These failings may indicate training or resource issues or both. The Commissioner trusts that the authority will carefully consider its handling of this case and make significant improvements in the future to ensure that adequate responses are provided to future requesters in a timely manner in accordance with the Council's statutory obligations.

Engagement with the ICO

33. During the course of his investigation, the Commissioner encountered considerable delay on account of the Council's reluctance to meet the timescales for a response set by the Commissioner. The authority also failed to return a significant number of the Commissioner's telephone

calls. Accordingly, the Commissioner does not consider that the Council engaged with the Commissioner in a particularly cooperative way and this is clearly not within the spirit of the FOIA. As such, the Commissioner expects to see significant improvements in this regard in the future.

Right of Appeal

34. 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: 0300 1234504

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 31st day of May 2011

Signed

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

Legal Annex – Freedom of Information Act 2000

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(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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.”

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."

Investigations and proceedings conducted by public authorities

Section 30(2) provides that –

"Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources."

Section 31(2) provides that –

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

- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper..."