

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 June 2011

Public Authority: Bury Council
Address: Town Hall
Knowsley St
Bury
BL9 0SW

Summary

The complainant requested information about various matters relating to a meeting of the public authority's members Standards Assessment Subcommittee. Some information was disclosed, but some was refused under the provisions of section 44(1)(a) of the Act, namely that disclosure was prohibited under another enactment. The Commissioner finds that the statutory bar provided at section 63 of the Local Government Act 2000 applies to most of the withheld information and therefore section 44 was correctly applied. Some information was incorrectly withheld, and the Commissioner finds breaches of section 44, section 1, section 10 and section 17 of the Act. He does not require any steps 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 29 July 2010, the complainant sent an email to Bury Council containing the following request for information:

"1 Please supply copies of the Pre-Assessment reports in relation to the Members Standards Assessment Sub-Committee which met on 12 May 2010.

2 Please supply a copy of the Decision Notice SC13

3 Please supply a copy of SC14

4 Please supply a copy of the Pre-Assessment Report SC15

5 Please supply a copy of the Pre-Assessment Report SC16

6 Please supply copies of any other information given to the members of both Sub-Committees

7 Please supply copies of any other Pre-Assessment reports in relation to the Members Standards Assessment Sub-Committee which met on 13 July 2010.

8 Please supply copies of any other records which have been made in relation to both reviews mentioned above for example minutes of the meeting or any other record such as a written determination etc.

9 Please supply details of how the Members Standards Assessment Sub-Committee are selected and the criteria by which it is necessary to be selected for duty on such a Sub-Committee.

10 Please provide information in relation to both Sub-Committees which shows how the decision decided was arrived at. For example were the decisions made unanimous or if not please provide the results of any voting that took place for each separate meeting."

3. Bury Council (the council) replied on 17 August 2010. It refused to provide copies of the papers circulated at the meetings, including pre-assessment reports. It disclosed the requested decision notices SC13 and SC14 (parts 2 and 3 in the request). In response to part 9 of the request it explained the selection process for the Standards Assessment Sub-Committee and, in relation to part 10, explained that no vote was taken and decisions were taken through consensus.
4. The council did not cite any exemptions in the Act as grounds for its refusal, did not inform the complainant of any internal review process available to him, and did not inform him of his right to bring a complaint to the Information Commissioner.

5. The complainant requested an internal review on 18 August 2010.
6. The council conducted an internal review and wrote to the complainant on 10 November 2010 with the outcome of that review. It confirmed that the council had disclosed information in response to parts 2, 3 and 9 of his request. It explained its reasons for refusing information relating to the pre-assessment reports and information provided to the members of sub-committees who met to consider those reports, and also to part 8 of his request. The information, comprising parts 1 and 4-8 in the request, was refused because it was considered to be exempt under the provisions of section 44 of the Act, due to the restrictions contained in section 63 of the Local Government Act 2000 (LGA2000) and regulation 12 of the Standards Committee (England) Regulations 2008 (SCER2008).

The Investigation

Scope of the case

7. On 28 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 the following points:
 - The council had refused to provide information, without stating the exemptions it had applied, and no response to his request for an internal review had been received.
 - He wanted the Commissioner to serve a Decision Notice stating all the relevant breaches of the Act which applied.
8. The Commissioner has therefore examined the public authority's application of section 44 of the Act.

Findings of fact

9. Complaints of the type referred to in this case are not general complaints about a council's actions, but are complaints about the ethical behaviour and standards of council members. These are subject to a Code of Conduct¹ approved by Parliament. This is administered by Standards for England, but since the introduction of the Local Government Public Involvement in Health Act 2007 and the Standards Committee (England) Regulations 2008, the assessment of complaints

¹ See <http://www.standardsforengland.gov.uk/Guidance/TheCodeofConduct/>

has been devolved to the councils themselves, via its Monitoring Officer who establishes the necessary Standards Committees and Sub-committees.

Chronology

10. The Commissioner wrote to both parties on 11 November 2010 to acknowledge the complaint. He received a response from the council dated 25 November 2010. The council accepted that it did not provide a refusal notice in the first instance, largely because the response was given by its Democratic Services department, which had been dealing with the complainant on related matters. A copy of the internal review letter sent to the complainant was included by the council, together with copies of the withheld information.
11. The Commissioner wrote to the public authority again on 21 January 2011. He observed that withheld documents relating to items 6 and 9 in the complainant's request were already in the public domain, available for download from the Standards for England website². He queried whether that might suggest that an unnecessarily literal approach to the statutory prohibitions at section 63 of the LGA2000 might have been taken. He requested further clarification for the council's application of section 44 of the Act in the circumstances of the request.
12. The council replied on 7 February 2011. It acknowledged that certain elements were in the public domain, explained that it had referred the complainant to some of this information at a later stage, prior to internal review and assured the Commissioner that this was not indicative of an unreasonable and literal approach taken to the material concerned.
13. The council provided clarification for its approach, and the application of section 44 of the Act in the circumstances. It explained that due to changes in the way complaints were handled, those previously undertaken by the Standards Board for England [now known as Standards for England], and dealt with by ethical standards officers within Standards for England, were now dealt with by internal standards committees within the public authority itself and came under the responsibilities of a council's Monitoring Officer.

² Item 6 comprises the following document

<http://www.standardsforengland.gov.uk/CaseinformationReporting/SfEcasesummaries/Case summaries/D/DersinghamParishCouncil/>

Item 9 comprises the following document

<http://www.standardsforengland.gov.uk/Guidance/TheLocalStandardsFramework/>

14. This required that the 'sifting process' whereby complaints were examined to determine which should be pursued, previously undertaken confidentially by Standards for England, would now be done by the public authority. Appropriate provision for that process to remain confidential was provided by amendments to the Local Government Act 1972 (LGA1972), and the previously mentioned statutes LGA2000 and SCER2008. The need for confidentiality at this 'sifting' stage was to allow for the possibility that a complaint against a councillor might be groundless, perhaps malicious, or politically motivated, and therefore it was necessary to protect that councillor's reputation until a potential breach of the Code of Conduct had been identified.
15. The Commissioner wrote to the complainant and spoke to him on several occasions, between 14 February and 22 February 2011. The complainant's arguments may reasonably be summarised as follows:
- (i) The council's response to him cites *"guidance relating to Standards Sub Committees [which states that] these meetings and the proceedings are closed to the public."* He argues that it is not clear why guidance that the meetings are closed to the public affects the right to information under the Act. If this is simply guidance (ie has no basis in statute) then it should not preclude the disclosure of the information under the Act.
 - (ii) He disputes that certain elements of the requested information will fall within the scope of LGA2000 or SCER2008.
 - (iii) He argues that section 63 of the LGA2000 deals with information *'obtained by'* ethical standards officers, and that this does not apply to information *'given to'* them, nor to information generated by them, such as minutes of meetings, etc. He maintains that the information he requested was *'given to'* the standards committee members, not *'obtained by'* them. Therefore section 44 of the Act is not engaged.
 - (iv) He further argues that LGA2000 refers to ethical standards officers, and cases which have been referred to such officers by Standards for England. The matter was not referred to the council by Standards for England.
 - (v) In failing to disclose SC16 (item 5 on the request) but disclosing SC13, SC14 and SC15, the council has not been able to draw any distinction between the disclosed documents and SC16 which remains withheld.
 - (vi) He also argues that the purpose of regulation 12 of SCER2008 in modifying section 63 of the LGA2000 is *"to allow monitoring officers to disclose information when they think it is*

necessary". The Commissioner understands him to be arguing that it is not the function of section 63 of the LGA2000 (via SCER2008) to restrict access to information but to facilitate its disclosure.

In respect of item (v) above, the Commissioner observes that the council intended to withhold SC15 and this appears to have been sent to the complainant in error.

16. The Commissioner wrote again to the council, and received responses, during February, March and April 2011.

Analysis

Exemptions

Section 44

17. The council has confirmed to the Commissioner that those elements of the request which were refused under section 44 of the Act are the items numbered 1, 4, 5, 6, 7 and 8 in the request.
18. Section 63 of LGA2000 is about the restrictions on disclosure of information. Regulation 12 of SCER2008 concerns the application of section 63 of LGA2000 to a council's Monitoring Officer. Both are reproduced at the legal annex to this decision notice.
19. It is clear, from the title to section 63 of LGA2000 that this section is concerned with *"Restrictions on disclosure of information"*. The Commissioner further considers that section 12 of SCER2008 should be interpreted as extending the provisions of section 63 of LGA2000 to council Monitoring Officers. This is consistent with the council's explanation that Monitoring Officers have taken on responsibility for handling complaints which were previously dealt with by ethical Standards Officers from Standards for England.
20. It is not disputed by the complainant that regulation 12 extends the provisions of section 63 of LGA2000 to council Monitoring Officers. Section 63 is clearly stated to be concerned with restrictions on disclosure of information. It would therefore be an unusual construction of regulation 12 if it not only applied the provisions of section 63 to Monitoring Officers, but did so while also giving section 63 the opposite sense. The Commissioner is satisfied that the complainant's interpretation of these provisions, at part (vi) of paragraph 15, above, is mistaken.
21. The Commissioner considers the appropriate construction of section 63(1) of LGA2000, as modified by SCER2008, should therefore be:

"Information obtained by [monitoring officers] under section 61 or 62 must not be disclosed unless one or more of the following conditions is satisfied"

22. The applicable conditions are specified at sub-paragraphs (a) to (e) of the same section, with the addition of (aa) derived from regulation 12 of SCER2008. The Commissioner has examined these conditions and finds that they do not apply to the majority of the information withheld in response to the complainant's freedom of information (FOI) request:
 - it is not a 'function of a monitoring officer', nor of a 'standards committee or sub-committee, under part 3 of the Act' to respond to FOI requests;
 - there is no evidence that there is any consent to disclosure;
 - there is, for the most part, no evidence that the information has previously been disclosed to the public with lawful authority (but see paragraphs 25-27, below);
 - the disclosure is not for the purposes of criminal proceedings;
 - the disclosure is not for the purposes of any function of the Audit Commission.
23. The complainant further argues that the requested information, rather than being 'obtained by' the monitoring officer or Standards Committee, should be considered to have been 'provided to' them. He argues that information will only have been 'obtained by' such a party if it took steps to locate or acquire information during an investigation or other process of enquiry.
24. The Commissioner's view is that it is the content of the information, not the mechanism by which it was imparted, which will mostly determine whether the information has been 'obtained by' the Standards Committee – specifically: whether the information has been made available to the committee in furtherance of its statutory functions under section 63 of LGA2000. In this case, the Commissioner has examined the information withheld under section 44 of the Act, and he is satisfied that it is not information generated by the standards committee, but that it has been provided to the committee for the purposes of its functions. Consequently, he finds that section 63 of LGA2000 is engaged.
25. As explained at paragraph 11, one refused item (number 6 in the request) was already in the public domain. This would therefore not be exempt from disclosure under section 44, because the provisions of section 63(1)(c) of the LGA2000 permit disclosure if *"the information*

has previously been disclosed to the public with lawful authority" and in this case the information was available to download from the Standards for England website.

26. The Commissioner finds that, in respect of items 1, 4, 5, 7 and 8 listed in the request, the public authority correctly applied section 44(1)(a) of the Act.
27. In respect of item 6 of the request, section 44 was not correctly applied, because the information was already in the public domain, and therefore the statutory bar at section 63 of LGA2000 did not apply, due to the provisions of subsection 63(1)(c).

Procedural Requirements

Section 1

28. The council's initial response to the request was relatively informal. Some of the requested information was disclosed, and some withheld but no grounds for refusal to disclose under the Act were cited.
29. In respect of item 10 in the request, the explanation given was that no vote was taken, and the decisions were reached through consensus. The complainant argues that the response provided does not supply the requested information. The Commissioner considers that that particular element of the response, taken in the context of the request overall, may be interpreted to explain (ie, provide information on...) how the decision was arrived at, but that no information is held in relation to the results of any voting because no voting actually took place. Due to the informality of the response, the council did not explicitly deny that this information was held, however the Commissioner considers that the complainant would have understood, from the response, that this was the case. He therefore does not find a breach of section 1(1)(a) in respect of item 10 of the request.
30. The council's response to item 9 in the request explained the form the standards assessment sub committee takes, and clarification that it is formed from members of the standards committee. No information was disclosed in this part of the response, other than in the form of a written explanation however, as with item 10 above, this explanation does constitute the provision of some information in response to the request.
31. The Commissioner raised this particular point with the council, which explained that the only information it holds which would provide information relating to this part of the request is the Standards for England guidance on the local assessment of complaints (referred to and linked at paragraph 9). The council informed the Commissioner that the complainant had been referred to this document at a later stage, but

prior to its internal review. The Commissioner checked this with the complainant, who is quite sure that he has not been referred to this document by the council. The council concedes that it is unable to show that it referred the complainant to this document, and it accepts therefore that it is likely that this information has not been disclosed to the complainant.

32. By its failure to confirm information is held meeting the description at item 9 in the request, and by failing to disclose that information, the council has breached section 1(1)(a) and 1(1)(b) of the Act. The Commissioner observes that, through the Commissioner's involvement, the complainant has now downloaded a copy of this document.

Section 10

33. By its failure to disclose information held, the council has also breached section 10(1) in failing to comply with section 1 within 20 working days in respect of item 6 and item 9 in the request.

Section 17

34. The refusal notice of 17 August 2010 does not cite any exemption which is applied in respect of the refused information, explaining instead that

"these meetings and the proceedings are closed to the public. For this reason I am unable to issue papers circulated at the meetings you quote, including pre-assessment reports."

35. The public authority has breached section 17(1) of the Act in failing to provide the complainant with a notice that an exemption to disclosure was being applied, within 20 working days. This notice was not provided to the complainant until the council conducted its internal review.
36. The internal review of 19 November 2010 does cite the exemption provided at section 44 of the Act, and explains its application due to the provisions of section 63 of the LGA2000 and regulation 12 of SCER2008. It does not explain, however, that the exemption at section 44(1)(a) of the Act relates to information whose disclosure is prohibited by any other enactment. To this extent, therefore, while it is reasonably clear that the public authority is refusing the information on the grounds of the exemption at section 44 of the Act, no explanation is given as to the applicable subsection of section 44 so that the relevance of section 63 of LGA2000 may be clearly understood in the context of a refusal under the Act. This is also a breach of section 17(1)(b) of the Act.
37. The public authority failed to provide the complainant with particulars of its internal review procedure, and consequently has breached section 17(7)(a). While the internal review it conducted advised the complainant

of the contact details for the Commissioner, it did not provide particulars of the complainant's right to bring a complaint to the Commissioner under section 50 of the Act, a breach of section 17(7)(b) of the Act.

The Decision

38. 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 public authority correctly applied section 44(1)(a) of the Act in refusing the information described in items 1, 4, 5, 7 and 8 of the request.

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

- Information described in item 6 of the request was incorrectly withheld under section 44, because the statutory bar at section 63 of LGA2000 was disapplied due to the provisions of section 63(1)(c), that the information had previously been disclosed to the public with lawful authority.
- The public authority breached section 1(1)(a) and 1(1)(b) of the Act in respect of item 9 of the request, and section 1(1)(b) in respect of item 6 of the request.
- The public authority also breached section 10(1) of the Act in respect of items 6 and 9 of the request.
- The public authority's refusal notice breached section 17(1) and 17(7)(a) of the Act.
- The public authority's internal review breached section 17(1)(b) and 17(7)(b) of the Act.

Steps Required

40. The withheld information in respect of item 9 of the request has been drawn to the complainant's attention by the Commissioner during the course of his investigation. The withheld information in respect of item 6 of the request is identified and linked at paragraph 11 of this decision notice. While the Commissioner would normally order disclosure of this information he recognises that, in the circumstances, the withheld information has now been drawn to the complainant's attention such that to order its disclosure by the public authority would be artificial and unnecessarily burdensome.
41. Consequently, the Commissioner requires no steps to be taken.

Other matters

42. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:
43. The Commissioner notes that the internal review took longer than 20 working days to complete. While there is no statutory time for compliance with a request for an internal review, the Commissioner's guidance³ suggests that an internal review should take no longer than 20 working days to complete and, in exceptional cases where it may be reasonable to take longer, in no circumstances should the internal review take longer than 40 working days to complete. In this case the complainant requested an internal review on 18 August 2010 and the internal review was communicated to him on 10 November 2010, a period of 60 working days.

³ Available online at http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/TIME_LIMITS_INTERNAL_REVIEWS.ashx

Right of Appeal

44. 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

45. 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.
46. 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 27th day of June 2011

Signed

**Gerrard Tracey
Principal Policy Adviser
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,
- (g) section 41, and
- (h) section 44"

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.”

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-
 - (i) 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
 - (ii) 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."

Prohibitions on disclosure.

Section 44(1) 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,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court."

Section 44(2) provides that –

"The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)."

Section 63 of Local Government Act 2000 provides that –

"63 Restrictions on disclosure of information.

(1) Information obtained by ethical standards officers under section 61 or 62 must not be disclosed unless one or more of the following conditions is satisfied—

(a) the disclosure is made for the purposes of enabling the Standards Board for England, an ethical standards officer, the Commission for Local Administration in Wales, a Local Commissioner in Wales or the president, deputy president or any tribunal of either of the Adjudication Panels to perform their functions under this Part,

(b) the person to whom the information relates has consented to its disclosure,

(c) the information has previously been disclosed to the public with lawful authority,

(d) the disclosure is for the purposes of criminal proceedings in any part of the United Kingdom and the information in question was not obtained under section 62(2),

(e) the disclosure is made to the Audit Commission for the purposes of any functions of the Audit Commission or an auditor under the Audit Commission Act 1998.

(2) The Secretary of State or a relevant authority in England may give notice in writing to any ethical standards officer with respect to—

(a) any document or information specified in the notice, or

(b) any class of documents or information so specified,

that, in his or (as the case may be) their opinion, the disclosure of that document or information, or of documents or information of that class, would be contrary to the public interest.

(3) Where notice is given under subsection (2) to an ethical standards officer, any document or information specified in the notice, or any document or information of a class so specified, may not be disclosed by the ethical standards officer or any other person.

(4) A person who discloses information or a document in contravention of subsection (1) is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months, or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both."

Regulation 12 of the Standards Committee (England) Regulations 2008 provides that –

"Application of section 63 of the Local Government Act 2000 with modification

12.—(1) Subsection (1) of section 63 of the Act (restrictions on disclosure of information) shall apply in respect of information obtained by monitoring officers in the performance of any of their

functions under Part 3 of the Act and regulations made under that Part, as they apply in respect of information obtained by ethical standards officers under sections 61 and 62 of the Act, subject to the modification set out below.

(2) The modification is the insertion, after paragraph (a), of the following paragraph—

“(aa) the disclosure is made for any one or more of the following purposes—

(i) enabling a standards committee or sub-committee of a standards committee established under this Part to perform any of its functions under this Part, or under regulations made under this Part, in connection with the investigation and consideration of an alleged breach of an authority's code of conduct; or

(ii) enabling a tribunal drawn from members of the Adjudication Panel to consider any appeal from a finding of a standards committee or sub-committee of a standards committee established under this Part in connection with an alleged breach of an authority's code of conduct.”.