

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 May 2011

Public Authority: Standards for England
Address: Fourth Floor
Griffin House
40 Lever Street
Manchester
M1 1BB

Summary

The complainant requested a copy of a report into a complaint about a councillor. Standards for England disclosed a copy of the report with elements redacted under the provisions of section 44 of the Act, that disclosure of the redacted information was exempt under another enactment, specifically, section 63 of the Local Government Act 2000. The Commissioner finds that the redacted information was correctly refused under section 44 of the Act and 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 18 July 2010 the complainant submitted a request to Standards for England, for:

"At its meeting on 21 June 2010, Nottingham City Council's Standards Committee considered a report by the Standards Board for England on [case reference] concerning [name]. Please could you provide me with a copy of this report."

3. Standards for England (SFE) replied on 12 August 2010, providing a copy of a redacted report to the complainant. SFE explained that the redactions were necessary because the redacted information was exempt under the provisions of section 44 of the Act, that disclosure of the requested information was prohibited by any other enactment. In this case, SFE explained that the disclosure was prohibited by the provisions of section 63 of the Local Government Act 2000 (LGA2000). It also explained that some of the redactions were applied because the redacted information was personal data, and therefore exempt under the provisions of section 40 of the Act.
4. The complainant requested an internal review on 30 August 2010, arguing that one route to disclosure under section 63 of the LGA2000 was by the consent of the person to whom the information relates. He disagreed with SFE's view that it was under no obligation to seek that consent, and suggested that its obligations under the Act required it to take reasonable action to enable disclosures under the Act to be made, including *"making all reasonable attempts to contact witnesses to seek their permission to disclose all information"*.
5. SFE conducted an internal review and wrote again to the complainant on 23 September 2010 with the outcome. The internal review found that the level of disclosure already provided to the complainant was correct.

Scope of the case

6. On 7 October 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:

"Standards For England appear to be arguing that they are under no obligation to request permission from 3rd parties to disclose information provided by them. This is important as permissions would provide a route to disclosure under s.63 of the Local Government Act 2000 meaning that the exemption under s.44 FoIA would not apply.

I would argue that seeking permissions would be covered under advice and assistance."

7. The complainant also argued that the code of practice issued in compliance with section 45 of the Act¹ (the 'code of practice') requires consultation with third parties where necessary. The Commissioner

¹ See <http://www.justice.gov.uk/guidance/docs/foi-section45-code-of-practice.pdf>

understands this to be a reference to part IV of the code of practice. The complainant has not disputed the redaction of personal data, under section 40 of the Act.

8. The Commissioner has therefore investigated:
 - whether there is a requirement to request permission to disclose the requested information, under the duty to provide advice and assistance at section 16 of the Act, or in conformity with the code of practice issued in compliance with section 45 of the Act.
 - In order to do this, the Commissioner has found it helpful to briefly consider the application of section 44 of the Act to the withheld information.

Chronology

9. Receipt of the complaint was acknowledged to both parties on 15 November 2010.
10. On 1 March 2011 the Commissioner wrote again to both parties about his investigation of the complaint. He informed the complainant of his initial view that the complainant's interpretation of the duty to provide advice and assistance under section 16 of the Act, and the requirements of the code of practice, did not apply in the circumstances he envisaged.
11. Due to communication difficulties, SFE had not received the Commissioner's previous correspondence and a copy was re-sent on 8 March 2011.
12. The complainant replied on 11 March 2011, disagreeing with the Commissioner's initial view.
13. SFE provided a detailed response to the Commissioner's enquiries on 1 April 2011.

Analysis

Exemptions

Section 44

14. Section 63 of the LGA2000 states:

"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.

and

(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.

15. SFE provided the Commissioner with a copy of the redacted report as sent to the complainant and an unredacted version, together with notes explaining its application of section 44 and section 40 of the Act to the redactions it had applied.

16. The Commissioner has examined these, and is satisfied that the information has been redacted on the basis that it is either personal data, or because it meets the criteria at section 63(1), namely that it is "Information obtained by ethical standards officers under section 61 or 62". It is typically described, in the redacted version, as "*Ethical Standards Officer's summary of relevant oral and documentary evidence*" or similar variations on this description. He is therefore

satisfied that the public authority has correctly applied section 44 of the Act in redacting the withheld information from the disclosed document.

Procedural Requirements

Section 16

17. The complainant has not argued that the prohibitions at section 63(1) do not apply to the requested information, but rather that section 63 provides a route to disclosure if consent is given by the person to whom the information relates. He maintains that compliance with the Act will require such consent to be sought and, if given, the exemption at section 44 of the Act will not apply. While there is no specific section of the Act which requires a public authority to seek consent for disclosure, it is the complainant's view that requesting consent will fall within the duty to provide advice and assistance, under section 16 of the Act.

Section 16(1) provides that -

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

Section 16(2) provides that –

"Any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

18. Part II of the code of practice under section 45, referred to in section 16(2) above, gives guidance on the provision of advice and assistance in compliance with section 16 of the Act, to persons who either propose to make, or who have made, requests to a public authority. Paragraphs 4-7 deal with advice and assistance to persons proposing to make requests, and are concerned only with assisting an applicant to frame a request and facilitate the submission of the request. Paragraphs 8-11 deal with advice and assistance in clarifying a request. It states, at paragraph 9:

"Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought [...]"

19. It further states at paragraph 12, which deals with the limits to the provision of advice and assistance:

"If, following the provision of such assistance, the applicant still fails to describe the information requested in a way which would

enable the authority to identify and locate it, the authority is not expected to seek further clarification. The authority should disclose any information relating to the application which has been successfully identified and found for which it does not propose to claim an exemption."

20. The part of the section 45 code of practice which relates directly to the duty to provide advice and assistance is therefore concerned only with facilitating the making of a request which a public authority can understand and respond to by identifying and locating information it holds. It makes no requirement to seek consent for disclosure from third parties who have an interest in the requested information.
21. Consequently, the duty to provide advice and assistance under section 16 of the Act, as described in part II of the section 45 code of practice, does not require a public authority to approach any interested parties and seek their consent for disclosure. As section 16(2) makes clear, compliance with section 16(1) requires only that the public authority follows the requirements of the section 45 code of practice. The Commissioner has therefore considered whether any other part of the section 45 code of practice would require a public authority to seek consent, as the complainant asserts.
22. Part IV of the code of practice deals with 'Consultation with Third Parties' and might therefore be considered of relevance. Paragraphs 25-27 are most directly applicable:

"25. There are many circumstances in which:

- *requests for information may relate to persons other than the applicant and the authority; or*
- *disclosure of information is likely to affect the interests of persons other than the applicant or the authority.*

26. It is highly recommended that public authorities take appropriate steps to ensure that such third parties, and those who supply public authorities with information, are aware of the public authority's duty to comply with the Freedom of Information Act, and that therefore information will have to be disclosed upon request unless an exemption applies.

27. In some cases it will be necessary to consult, directly and individually, with such persons in order to determine whether or not an exemption applies to the information requested, or in order to reach a view on whether the obligations in section 1 of the Act arise in relation to that information. But in a range of other circumstances it will be good practice to do so; for example where a

public authority proposes to disclose information relating to third parties, or information which is likely to affect their interests, reasonable steps should, where appropriate, be taken to give them advance notice, or failing that, to draw it to their attention afterwards."

23. It is clear, from this, that the requirement for consultation with third parties relates primarily to ensuring that those third parties are advised of the possibility of disclosure under the Act, or are made aware in circumstances where disclosure is contemplated, or informed if disclosure is made in response to a request. Paragraph 27, in particular, provides that *"In some cases it will be necessary to consult, directly and individually, with such persons in order to determine whether or not an exemption applies to the information requested, or in order to reach a view on whether the obligations in section 1 of the Act arise in relation to that information."*
24. In other words, consultation may be necessary if an exemption is contemplated, and the views of the consultee will be material to whether or not the exemption applies. In the present case, it is clear that the exemption has been correctly applied, and no consultation with the person to whom the information relates was necessary in order to establish that to be the case. Any consultation would only be done in order to find out whether that person might voluntarily lift any restrictions on disclosure, so that the exemption could be disapplied. The section 45 code of practice does not make any specific provision for that, therefore it is not possible to conclude that the public authority has failed to comply with any aspect of the section 45 code of practice. Consequently, no breach of section 16(1) can be inferred.
25. Furthermore the Information Tribunal in the case of *DBERR v IC and Friends of the Earth (EA/2007/0072)*² stated, at paragraph 104:

"It seems clear to us that FOIA requires an assessment as at the date of the request (or thereabouts) and this appears to be the consistent approach of the Tribunal in its jurisprudence."
26. While that particular tribunal was concerned with the consideration of the public interest, and is stating that it is the public interest at the date of the request which is material, the wider principle implicit in this view is relevant. Specifically, the duty to disclose information held, under

² Available online at http://www.informationtribunal.gov.uk/DBFiles/Decision/i181/DBERRvIC_FOEFinalDecision_w eb0408.pdf

section 1(1)(b) of the Act, relates to the circumstances which exist at the time of the request. Section 1(4) of the Act makes this clear.

27. The Commissioner's view is therefore that, unless consent has been given prior to the receipt of the request or, at the very latest, by the statutory time for the public authority's response to the request, then the response must take into account the circumstances which prevail at that time: namely, in this case, that no consent for disclosure exists and the statutory bar shall be applied.
28. As has been found above, there is no requirement under the section 45 code of practice that such consent must be proactively sought when a request is received. The matter of seeking consent from parties, where consent would provide a route to disclosure, has been considered by the Information Tribunal in the case of *De Mello v IC and Environment Agency* (EA/2008/0054)³ which stated, at paragraph 50:

"The Tribunal has, however, some sympathy with the Appellant's point that -- in this kind of situation -- a check by the EA with the original complainant, to see whether there was any objection to releasing the letter, might have resolved the situation and saved a significant cost to the public [...] It may be that the EA and other such public bodies wish to review their initial procedures in situations such as this -- not because it is a matter of law but simply because it is a matter of common sense -- but that is a matter for them."

29. The context under consideration in that particular tribunal was that of personal data, and confidentiality, under the Environmental Information Regulations 2004 (the EIR), in circumstances different from (but broadly applicable to) the circumstances at issue in this case. The Commissioner notes particularly that, while the tribunal expresses sympathy with the view that common sense might recommend that consent could be sought, it acknowledges that this is not a matter of law – in other words there is nothing within the applicable legislation which required such consent to be sought.
30. The Commissioner has examined the applicable elements of the section 45 code of practice, and the Act itself, and has found no support for the complainant's view that the duty to provide advice and assistance under section 16 of the Act would require consent to be sought in circumstances where such consent would provide a legitimate route to

³ Available online at

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i276/R%20de%20Mello%20v%20IC%20&%20EA%20\(EA-2008-0054\)%20Decision%2011-12-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i276/R%20de%20Mello%20v%20IC%20&%20EA%20(EA-2008-0054)%20Decision%2011-12-08.pdf)

disclosure. It is therefore entirely at the discretion of a public authority if it chooses to seek consent. The disclosure regime under consideration in the case of *De Mello*, above, was the EIR, not the Act, but the EIR is itself closely connected to the Act and the Commissioner considers it reasonable, in the circumstances, to draw some additional support for his view from the observations of the tribunal in that case.

31. For this reason, while the Commissioner acknowledges that there may be circumstances in which seeking consent for disclosure would be a reasonable or appropriate course, he cannot agree with the complainant's assertion that the duty to provide advice and assistance under section 16 of the Act confers an obligation on a public authority to seek consent, in those cases where consent will remove any bar to disclosure.

The Decision

32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

33. The Commissioner requires no steps to be taken.

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

35. 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.
36. 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

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 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"Where a public authority –

- (c) reasonably requires further information in order to identify and locate the information requested, and
- (d) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –

"The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

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”

Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

Section 16(2) provides that –

“Any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

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-

(g) is prohibited by or under any enactment,

(h) is incompatible with any Community obligation, or

(i) 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).”

Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000

II The provision of advice and assistance to persons making requests for information

3. The following paragraphs of this Code apply in relation to the provision of advice and assistance to persons who propose to make, or have made, requests for information to public authorities. They are intended to provide guidance to public authorities as to the practice which it would be desirable for them to follow in the discharge of their duty under section 16 of the Act.

Advice and assistance to those proposing to make requests:

4. Public authorities should publish their procedures for dealing with requests for information. Consideration should be given to including in these procedures a statement of:

- what the public authority's usual procedure will be where it does not hold the information requested (see also III - "Transferring requests for information"), and
- when the public authority may need to consult other public authorities and/or third parties in order to reach a decision on whether the requested information can be released (see also IV - "Consultation with third parties"),

5. The procedures should include an address or addresses (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. A telephone number should also be provided, where possible that of a named individual who can provide assistance. These procedures should be referred to in the authority's publication scheme.

6. Staff working in public authorities in contact with the public should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need where appropriate to draw these to the attention of potential applicants who appear unaware of them.

7. Where a person is unable to frame his or her request in writing, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. Depending on the circumstances, consideration should be given to:

- advising the person that another person or agency (such as a Citizens Advice Bureau) may be able to assist them with the application, or make the application on their behalf;
- in exceptional circumstances, offering to take a note of the application over the telephone and then send the note to the applicant for confirmation (in which case the written note of the telephone request, once verified by the applicant and returned, would constitute a written request for information and the statutory time limit for reply would begin when the written confirmation was received).

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

Clarifying the request:

8. A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable,

provide assistance to the applicant to enable him or her to describe more clearly the information requested.

9. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.

10. Appropriate assistance in this instance might include:

- providing an outline of the different kinds of information which might meet the terms of the request;
- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
- providing a general response to the request setting out options for further information which could be provided on request.

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

11. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

Limits to advice and assistance

12. If, following the provision of such assistance, the applicant still fails to describe the information requested in a way which would enable the authority to identify and locate it, the authority is not expected to seek further clarification. The authority should disclose any information relating to the application which has been successfully identified and found for which it does not propose to claim an exemption. It should also explain to the applicant why it cannot take the request any further and provide details of the authority's complaints procedure and the applicant's rights under section 50 of the Act (see "Complaints Procedure" in section VI).

IV Consultation with Third Parties

25. There are many circumstances in which:

- requests for information may relate to persons other than the applicant and the authority; or
- disclosure of information is likely to affect the interests of persons other than the applicant or the authority.

26. It is highly recommended that public authorities take appropriate steps to ensure that such third parties, and those who supply public authorities with information, are aware of the public authority's duty to comply with the Freedom of Information Act, and that therefore information will have to be disclosed upon request unless an exemption applies.

27. In some cases it will be necessary to consult, directly and individually, with such persons in order to determine whether or not an exemption applies to the information requested, or in order to reach a view on whether the obligations in section 1 of the Act arise in relation to that information. But in a range of other circumstances it will be good practice to do so; for example where a public authority proposes to disclose information relating to third parties, or information which is likely to affect their interests, reasonable steps should, where appropriate, be taken to give them advance notice, or failing that, to draw it to their attention afterwards.

28. In some cases, it may also be appropriate to consult such third parties about such matters as whether any further explanatory material or advice should be given to the applicant together with the information in question. Such advice may, for example, refer to any restrictions (including copyright restrictions) which may exist as to the subsequent use which may be made of such information.

29. No decision to release information which has been supplied by one government department to another should be taken without first notifying, and where appropriate consulting, the department from which the information originated.

30. Where information to be disclosed relates to a number of third parties, or the interests of a number of third parties may be affected by a disclosure, and those parties have a representative organisation which can express views on behalf of those parties, the authority may consider whether it would be sufficient to notify or consult with that representative organisation. If there is no representative organisation, the authority may consider that it would be sufficient to notify or consult with a representative sample of the third parties in question.