

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 March 2011

Public Authority: Commission for Local Administration in England
(Local Government Ombudsman)
Address: Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant made a request to the public authority for information regarding a complaint he had previously made against a local authority. The public authority refused the request under section 44 of the Act which provides for an exemption from the right to know where disclosure is prohibited under any other enactment. It said that the relevant statutory prohibition was section 32(2) of the Local Government Act 1974. The Commissioner has found that section 44 was correctly applied; he requires no further 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. The Commissioner notes that under the Act the Local Government Ombudsman is not a public authority itself, but is actually an executive agency of the Commission for Local Administration in England which is responsible for the Local Government Ombudsman and therefore, the public authority in this case is actually the Commission for Local

Administration in England not the Local Government Ombudsman. However, for the sake of clarity, this decision notice refers to the Local Government Ombudsman as if it were the public authority.

3. On 22 June 2009 the complainant made a request to the Local Government Ombudsman (LGO) for a copy of Mr [redacted]'s review into the LGO's handling of a complaint against Bath and North East Somerset Council.
4. The LGO provided a response on 25 June 2009, within 20 working days, in which it explained that the information was exempt from disclosure under section 44 of the Act by virtue of section 32(2) of the Local Government Act 1974. It said that under this statutory prohibition the Ombudsman is not permitted to disclose any information obtained in the course of, or for the purposes of, the investigation of a complaint, unless he or she considers it necessary for the purposes of the investigation. The public authority said that it believed that releasing the information was not necessary for the purposes of the investigation.
5. The complainant requested an internal review of the public authority's decision on 6 July 2009. He provided the LGO with further arguments for disclosure in a letter dated 1 August 2009.
6. The public authority provided the complainant with the outcome of its internal review on 10 August 2009. It said that it was upholding its earlier decision to refuse the request under section 44 of the Act by virtue of section 32(2) Local Government Act 1974.

The Investigation

Scope of the case

7. On 7 September 2009 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 LGO's application of section 44.

Chronology

8. On 28 October 2009 the Commissioner wrote to the public authority notifying it of the complaint and inviting its comments.

9. In a letter dated 8 January 2010 the LGO provided the Commissioner with a copy of the withheld information for consideration.

Findings of fact

10. The complainant is a representative of five individuals and the information request relates to complaints they had previously made to the public authority against their local authority Bath and North East Somerset Council (the Council). The complaint concerned the Council's handling of a complaint made about noise generated by a Kebab van in a pub car park

Analysis

Exemptions

11. A full text of all the relevant statutes referred to in this section is enclosed within the legal annex.
12. The Commissioner recognises that section 32(2) of the Local Government Act 1974 acts as a statutory prohibition on the disclosure of information obtained in the course of, or for the purposes of, an investigation by the public authority and is satisfied that responding to a freedom of information request is not one of the reasons for disclosure provided for in sub-sections a) – c) of section 32(2).
13. The Commissioner has considered the information withheld from the complainant and has assessed the extent to which any or all of this information is covered by the statutory prohibition. It is clear that information falling within the scope of the request would have been obtained by the public authority in the course of, or for the purposes of, its investigation into the complaints against the Council. The Commissioner is satisfied that this information is covered by the statutory prohibition and that the exemption was applied correctly.
14. The complainant's request is a request for information generated by the public authority itself. It is the Commissioner's view that where such information draws upon, or makes reference to the complaint against the Council or the public authority's investigation into such complaints then this constitutes information obtained in the course of, or for the purposes of, the investigation. Whilst such documents may have been generated by the public authority itself and have therefore not been physically obtained, it is clear that the information contained

within the documents will have been obtained in the course of the investigation.

15. The complainant has submitted comprehensive argument about the wording of the Local Government Act 1974, where the section 32(a) would allow for release for the purposes of an investigation under section 30 or 31 of that Act. However, the Upper Tribunal (*case no. GIA/605/2010 Ofcom v Morrissey and the Information Commissioner*) has provided further clarity on the extent to which the Commissioner's jurisdiction covers the need to examine the reasonableness of an approach taken by another authority under their own enactments. At paragraph 72, the conclusion is clear: -

"Neither the Information Commissioner nor the tribunal has jurisdiction to determine whether OFCOM acted unreasonably..."

Taking further direction from the same case, at paragraph 63,

"In short, the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA."

16. The Commissioner recognises that the Ombudsman has discretion to disclose information obtained in the course of or for the purposes an investigation where he or she feels that it would be beneficial for the purposes of that investigation. In reaching his decision the Commissioner has not sought to question the public authority's use of its discretion in this regard and is satisfied that the request has been dealt with in accordance with the Act.
17. Section 44 is an absolute exemption and therefore the Commissioner has not undertaken an assessment of the public interest test.

The Decision

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

Steps Required

19. The Commissioner requires no steps to be taken.

Right of Appeal

20. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 28th day of March 2011

Signed

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

Legal Annex

Section 44 of the Act 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 32(2) of the Local Government Act 1974 provides that:

“Information obtained by a local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this part of the Act shall not be disclosed except:

- a) for the purposes of the investigation and any report to be made under section 30 or 31 above; or
- b) for the purposes of any proceedings for an offence under the Official Secrets Act 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this part of this Act, by a local Commissioner or by an officer of either Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this part of this Act or for the purposes of an enquiry with a view to the taking of such proceedings, or
- c) for the purposes of any proceedings under section 29(9) above.”