

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2014

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DH

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence from a solicitor at Norfolk County Council ('the council') to his freeholder. The Commissioner's decision is that the council has correctly applied the exemption at section 30(1)(b) where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct. The Commissioner does not require any steps to be taken.

Request and response

2. On 18 January 2013, the complainant wrote to the council and requested information in the following terms:

"I recently received a service account for the period 1 July 2011 – 30 June 2012 from my Freeholder: London Land Securities Ltd ([named individual]).

Part of his charges are: Attendance on letters sent by [named individual], solicitor NP Law for Norfolk County Council. I asked to see copies of these letters but apparently it has fallen on deaf ears! Please, under the Freedom of Information Act, supply me with copies of this correspondence."

3. The council responded on 14 February 2013 and refused to provide the requested information citing the exemption at section 30(1) of the FOIA.
4. The complainant requested an internal review on 15 February 2013. The council provided its internal review response on 15 March 2013 in which it maintained its original position.

Scope of the case

5. The complainant provided information to the Commissioner on 13 February 2013. The Commissioner replied on 4 March 2013 to inform him that it was not possible from the correspondence received to determine the reason for the correspondence being sent to him. Following further correspondence, the Commissioner accepted the case for investigation on 25 June 2013 as the complainant was dissatisfied that the information he requested had not been provided.
6. During the Commissioner's investigation, the council clarified that it is relying on the exemption at section 30(1)(b) to withhold the requested information. Therefore, the Commissioner has considered whether the council was correct to apply the exemption at section 30(1)(b) where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct

Reasons for decision

Section 30 - Investigations and proceedings conducted by public authorities

7. Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –
(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct...”
8. The withheld information in this case is communications from a solicitor at the council to a person defined as the 'responsible person' under the Regulatory Reform (Fire Safety) Order 2005 ('FSO') concerning

compliance with regulatory requirements, non-compliance of which may lead to prosecution proceedings being undertaken by the council.

9. The council has explained that the Norfolk Fire & Rescue Service ('NFRS') has the statutory responsibility to oversee that the common areas of the property in question comply with fire safety standards. These standards and the powers to enforce them derive from the aforementioned Regulatory Reform (Fire Safety) Order 2005 ('FSO'). Article 30(1) of the FSO states:

"If the enforcing authority is of the opinion that the responsible person...has failed to comply with any provision of this Order or of any regulations made under it, the authority may, subject to article 36, serve on that person a notice (in this Order referred to as "*an enforcement notice*")."

10. The council issued an Enforcement Notice dated 24 August 2010 requiring that the freeholder takes certain steps to ensure that the property complies with fire safety standards. The council explained to the Commissioner that, at the time of writing this decision notice, it is in the final stage of its decision making process of whether to prosecute the freeholder under Article 32(1) of FSO which states:

"It is an offence for any responsible person...to:

(d) fail to comply with any requirement imposed by an enforcement notice'.

11. As section 30(1)(b) is a class-based exemption it is not necessary for the council to demonstrate that disclosure would prejudice any particular interest in order to engage the exemption.
12. Taking the above into consideration, the Commissioner is satisfied that that the information requested was held as part of investigations being conducted by the council, with the potential for criminal proceedings to be instituted which the council has to the power to conduct. He therefore considers the section 30(1)(b) exemption to be engaged in respect of all the withheld information.

The public interest test

13. As section 30(1)(b) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the FOIA. This favours disclosure unless;

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”.

14. The starting point is to focus on the purpose of the relevant exemption. With section 30(1)(b) this involves weighing the prejudice that may be caused to an investigation or prosecution, or more generally to the investigatory and prosecution processes of the public authority, against the public interest in disclosure. There is general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of criminal matters.
15. When considering the application of the public interest test under section 30(1)(b) the following are some of the factors which should be considered:
 - the stage or stages reached in any particular investigation or criminal proceedings
 - whether and to what extent the information has already been released into the public domain
 - the significance or sensitivity of the information
 - the age of the information

Public interest arguments in favour of disclosing the requested information

16. The complainant has stated that he is entitled, under section 22 of the Landlord and Tenant Act 1985, to see any item for which he is being charged and asserted that the withheld information in this case constitutes details of a bill that he has received from the freeholder.
17. Whilst it is not within the Commissioner's remit to adjudicate on the Landlord and Tenant Act 1985, he notes that the requirement imposed by section 22 is imposed upon the landlord rather than any holder of the information, which in this case includes the council.
18. Additionally, when determining whether a public authority should disclose information in response to a request, the issue is whether it is in the public interest to disclose that information to the public at large. The Commissioner does not consider an argument in relation to individual rights under the Landlord and Tenant Act 1985 to be relevant because it relates to the private interests of the complainant as opposed to the public interest in disclosure. It should be made clear that the Commissioner's concern is not with the private interest of individuals,

however understandable that interest might be. Whilst the requested information is clearly of interest to the complainant, this does not necessarily mean that there is a wider public interest that would be served by its release.

19. The council has recognised that there is a general public interest in transparency of public information. It has also said that the complainant may want to gain an insight into how the NFRS has dealt with the freeholder since April 2011 when representatives of the NFRS, Norfolk Constabulary and North Norfolk District Council met with the complainant, together with other leaseholders, and an MP, to discuss the problems that the leaseholders were continuing to experience with the freeholder.
20. The Commissioner is mindful of the public interest in promoting openness and transparency in the discharge of a public authority's statutory functions. For example, disclosure of the requested information may enable the public to understand why a particular investigation is taking a particular course, or in seeing that the investigation is being carried out properly.

Public interest arguments in favour of maintaining the exemption

21. The council said that there is public interest in public authorities being able to conduct negotiations and other correspondence in confidence with a view to securing compliance with regulatory obligations in respect of which the public authority is responsible for enforcing.
22. In this case, the council said that it has taken account of the need to ensure that it fulfils its duties in respect of enforcing compliance by a 'responsible person' under FSO. It is of the view that fulfilment of those duties is paramount and that disclosure of the information in fulfilment of the complainant's request would present an unacceptable risk to their execution. It commented that it is up to the freeholder whether he discloses to the leaseholders the communications requested, but as far as the NFRS is concerned, it should be allowed to investigate the matter in confidence and therefore without having to disclose documents that would be produced as evidence of the freeholders conduct in a prosecution.
23. The council also explained that some of the leaseholders have wanted the NFRS to take enforcement action against the freeholder and that whilst the NFRS must not and will not be influenced by public pressure in making its decision whether to prosecute, it would be an interference with its role if it is not allowed to maintain confidentiality in its dealings with the freeholder. It said that, for this reason, whilst it has given careful consideration as to whether the passage of time has altered the

public interest test that applies to the Section 30(1)(b), it has concluded that the public interest remains in favour of maintaining the exemption.

24. The Commissioner considers that if the effective enforcement of fire safety regulations is jeopardised then this has a clear public interest implication in terms of serious harm caused by breaches of fire safety legislation.
25. The Commissioner also notes that section 30 is concerned primarily with preserving the integrity of certain proceedings and investigations which public authorities have the power or duty to conduct and therefore recognises that there is an inherent public interest in ensuring the ability of public authorities to carry out investigations.

Balance of the public interest argument

26. In favour of disclosure, the Commissioner notes that the requested information is not publically available. Therefore, the withheld information would add to the public's understanding of the actions of NFRS in respect of this particular investigation and disclosure of the information would also ensure that NFRS is held to account for this particular investigation.
27. However, in attributing weight to the factors in favour of maintaining the exemption the Commissioner has taken into account the sensitivity of the matter under investigation. There is considerable public interest in a matter such as contravention of fire safety regulations being investigated as thoroughly and efficiently as possible and in prosecutions not being prejudiced by the premature disclosure of information under the FOIA. It is important for public confidence in the activities of NFRS that its ability to discharge its statutory functions should be effective and unimpeded.
28. The Commissioner has also taken into consideration the fact that at the time of the request the information was less than a year old and that at the time of writing this decision notice, the investigation process is still live as a decision whether to prosecute has not yet been made.
29. The Commissioner acknowledges that there will be cases involving this exemption where the balance of public interest will run in favour of disclosure but he is not satisfied that this is such a case. In all the circumstances of this case the Commissioner is of the view the public interest in maintaining the exemption outweighs the public interest in disclosing the information requested. The Commissioner therefore finds that the council was entitled to withhold the requested information under section 30(1)(b).

Right of appeal

30. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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