

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 October 2014

Public Authority: Derbyshire County Council

Address: County Hall
Matlock
Derbyshire
DE4 3AG

Decision (including any steps ordered)

1. The complainant has requested an Overview Report concerning a serious case review in respect of a child – BDS 10, who died on 2 June 2010. He specifically requires a copy of the report which was signed off by Derbyshire Safeguarding Children Board in July 2011. The complainant also requested copies of any correspondence passing between the author of the Overview Report and Derbyshire Constabulary.
2. After investigation, the Information Commissioner has found that the information sought by the complainant is not held by Derbyshire County council for the purposes of the FOIA. The Commissioner's decision is that the Council is entitled to rely on sections 3(2)(a) and 3(2)(b) of the FOIA.
3. The Commissioner does not require the Council to take any further action in this matter.

Request and response

4. On 30 January 2014, the complainant wrote to Derbyshire County Council and requested information in the following terms:

"Please provide a copy of the original "overview report" in relation to BDS 10. By 'original' I am requesting a copy of the report signed off in July 2011.

Please provide copies of any correspondence between the independent author and Derbyshire police from October 2013 to today's date in relation to this case."

5. On 11 March 2014 the Council responded to the complainant's request as follows:

"The original copy signed off was amended following the inquest and the final version published last week is on the DSCB (Derbyshire Safeguarding Children Board) website.

http://www.derbyshirescb.org.uk/prof_scr.html

There is no correspondence between Chris Few (the Report's author) and Derbyshire police from 31 October 2013 to the present."

6. On 14 March 2014 the complainant wrote to the Council to complain about the Council's withholding of the Report of July 2011. The complainant pointed out that the Council had withheld information from him without citing any exemption under the FOIA and in consequence of this failure, the Council had not considered the public interest test should an exemption require this. The complainant also asked the Council to review the accuracy of the Council's response to the second part of his request for information.
7. On 30 April 2014 the Council completed its review of its handling of the complainant's request and advised him of the outcome. The Council advised the complainant that it was relying on sections 22 and 42 of the FOIA to withhold the Report which was presented to the DSCB on 12 July 2011. The Council provided the complainant with its considerations of the public interest test.
8. The Council took the view that the Overview Report had to be considered as being in draft form and outlined its reasons for this designation as follows:

In May 2011, independent legal advice had been sought concerning the language and terminology of the report and on the implications of the publication of the report. Following the Inquest verdict in October 2013, and in the light of the legal advice the Council had received in May 2011, the 'draft Report' was reviewed and its contents were substantially amended. Some of the amendments which were made to the Report reflected evidence presented at the subsequent Inquest. This evidence had been unavailable to the Report's author, Mr Few, when he drafted his report.

The Working Together to Safeguard Children Guidance, whilst stating that a final report following a Serious Case Review should be published to the general public, does not state that the report has to be published by a particular date or that any drafts have to be published; only the final version.

The solicitors appointed by the [named] family required a copy of the revised Report prior to its publication in order to ensure its accuracy.

In view of the legal advice it received – which the Council assured the complainant it was always the Council's intention to follow, and of the Working Together Guidance, the Council considered that it could rely on section 22 of the FOIA – where the requested information is intended for future publication into consideration.

9. The Council also advised the complainant that section 42 of the FOIA was being applied to the Report. The council considered that the Report represented information where a claim to legal privilege could be maintained in legal proceedings.
10. In this case of the Council determined that it could rely on advice privilege, where protection is afforded to communications between the client and his legal adviser and where the communications are for the dominant purpose of seeking/giving legal advice.
11. The Council explained that the client was the Derbyshire Safeguarding Board and the lawyer was an external counsel who had been instructed to provide advice to the DSCB. The legal advice given by counsel related to the liabilities of the Council, as set out in the Overview Report.
12. In respect of the second part of the complainant's request, the Council confirmed that it holds no correspondence from the Report's author, Mr Few and Derbyshire Police for the period defined in his request. The Council advised Mr Corke that he could contact Derbyshire Police if he wanted further confirmation of this.

Scope of the case

13. The complainant contacted the Commissioner on 1 May 2014 to complain about the way his request for information had been handled and consequently the Commissioner wrote to the Council to enquire about its application of sections 22 and 42.
14. Having received the Commissioner's enquiry, the Council revisited its handling of the complainant's request. The Council subsequently confirmed to the Commissioner that it does not hold any correspondence between Mr Few and Derbyshire Police and advised him that, at the time the complainant made his request, the Council did not hold a copy of the Overview Report for the purposes of the FOIA.

15. In this notice the Commissioner has considered the Council's amended position.

Reasons for decision

Correspondence between the Mr Few – the independent author of the report, and Derbyshire Constabulary

Section 1 – Is the information held?

16. Section 1 of FOIA states 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.”

17. The Commissioner has sought to determine whether, on the balance of probabilities, the Council holds any correspondence passing between Mr Few and Derbyshire Constabulary.
18. The Commissioner makes this determination by applying the civil test of the balance of probabilities. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held in cases it has considered in the past.
19. Here, the Council has reasserted its position that it does not hold the correspondence sought by the complainant. The Council advised the Commissioner that it contacted Mr Few about this matter and that he assured the Council that no such correspondence exists.
20. The Commissioner considers that the Council was correct to make its enquiry of Mr Few and, given Mr Few's independent status and professional status, he finds no grounds for doubting the Council's assurance. Consequently the Commissioner has decided that, on the balance of probabilities, the Council does not hold the correspondence which the complainant seeks.
21. Notwithstanding this decision, the Commissioner considers that any correspondence which might have passed between Mr Few and Derbyshire Constabulary would not be held by the Council. The remaining parts of this notice explain why the Commissioner is drawn to this conclusion.

The overview report signed off in July 2011

Section 3 – Public authorities

22. Section 1(1) of the FOIA states 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.”

23. Section 3(2) of the FOIA states that:

“For the purpose of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

24. Before determining whether the Council is correct to rely on any of the exemptions to disclosure provided by Part II of the FOIA, he must first determine whether the information held by the Council is held for the purposes of the FOIA.

25. In the Commissioner’s view, where information is held by a public authority, to any extent for its own purposes, it will be considered to hold that information for the purposes of the FOIA.

26. In the Commissioner’s view, the only circumstance in which information, which is physically in the possession of the Council, would not be held for its own purpose would be where the Council holds that information on behalf of another person or body.

The Council’s position

27. In this case, the Council has argued that it only holds information within the scope of the complainant’s request on behalf of the Derbyshire Safeguarding Children Board (“the DSCB”). It therefore asserts that the information sought by the complainant is not held for the purposes of the FOIA by virtue of section 3(2)(a).

28. To support this position the Council has drawn the Commissioner’s attention to section 13 of the Children Act 2004, which establishes Local Children’s Safeguarding Boards, and to chapter 3 of the Working

Together to Safeguard Children – “Working Together” guidance which summarises the legal basis for the foundation of such boards.

29. Page 63 of the Working Together guidance states:

“All LSCB member organisations have an obligation to provide LSCB’s with resources (including finance) that enable the LSCB to be strong and effective.”

30. The Council is therefore obliged to provide administrative and financial support to the DSCB and to provide a minimum membership of that Board.

31. It is the Council’s position that the DSCB is an independent body and it asserts that the DSCB has the same footing as the Coroner’s Office and the local Health and Wellbeing Board.

32. To support this assertion, the Council has drawn the Commissioner’s attention to the Information Tribunal’s decision in Digby-Cameron v The Information Commissioner – EA/2008/0010, which relates to the position of the Coroner.¹

33. The Council maintains that it is just one of the authorities which provide the “building Blocks” which enable the DSCB to generate the report sought by the complainant.

34. The Council has assured the Commissioner that it exercised no control over the report or had access to it. Members of the Council’s staff, who sit as members of the DSCB, were provided with copies of the report purely for the purpose of their work for the Board.

35. The Council maintains that it has only been supplied with a copy of the report solely for the purpose of dealing with the Commissioner’s enquiry.

36. In this case, copies of the report were only supplied to members of the DSCB and access to decisions concerning to the report were strictly controlled by the Board’s Independent Chair. This position is confirmed by the minutes of the DSCB’s meeting of 5 August 2011:

“Feedback is to be provided to involved staff of the BDS 10, there is no legal issue regarding staff seeing the report but it should be made clear

¹ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i261/A.J.%20Digby-Cameron%20v%20ICO%20\(EA-2008-0010\)%20Decision%2016-10-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i261/A.J.%20Digby-Cameron%20v%20ICO%20(EA-2008-0010)%20Decision%2016-10-08.pdf)

who can see the report and what support should be given to the involved staff.”

37. The Council has informed the Commissioner that the report was watermarked in red as being 'Strictly Confidential - must not be copied or circulated', and that the copies of the report were not to be retained by members of staff.
38. The Council has also informed the Commissioner that it does not provide any direct assistance to the DSCB at its own discretion in creating, recording or removing information relevant to the DSCB's work. The Council 'hosted' copies of the report on its IT system but this was independent of the Council and of any access by Council staff.
39. In order to emphasise the independence of the DSCB, the Council drew the Commissioner's attention to a meeting of the DSCB held on 4 July 2011. That meeting was convened to discuss the final amendments to the overview report of BDS10, prior to it being signed off by lead professionals and its submission to Ofsted. The minutes of that meeting record that the final overview report and executive summary are to be presented to the Board to be signed off on Tuesday 12 July.

The Commissioner's conclusion

40. The Commissioner has decided that the Council does not hold the information sought by the complainant. He is persuaded by the representations made by the Council in respect of its role in facilitating the work of the DSCB and in providing membership of that organisation. He considers that the Council does not hold the information for any purpose relating to its own functions, other than those relevant to section 13 of the Children Act 2004.
41. The Commissioner is satisfied that the 'ownership' of the information lies with the DSCB itself and therefore the Commissioner has decided that the Council is entitled to rely on sections 3(2)(a) and 3(2)(b) of the FOIA.

The exemptions

42. The Commissioner recognises that, whilst maintaining that the information is not held by the Council for its own purposes, the Council has provided him with copies of the withheld information and its arguments why it should not disclose it to the complainant.
43. In view of his conclusion at paragraph 40, the Commissioner has not gone on to consider the Council's alternative position. He has not considered the Council's late application of section 31 of the FOIA.

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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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.

Signed

Andrew White
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