

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2015

Public Authority: Wigan Council
Address: Town Hall
Library Street
Wigan
WN1 1YN

Decision (including any steps ordered)

1. The complainant has requested information concerning allegations of the mistreatment of a child at Wood Fold School, by staff at the school. Wigan Council ('the Council') says it has released all the information that it holds with regard to one part of the request and does not hold relevant information with regard to another part. It is withholding some information within the scope of a third part under section 42 (legal professional privilege). During the Commissioner's investigation, the Council disclosed other information that it had initially withheld under 43(2) (commercial interests).
2. The Commissioner's decision is that Wigan Council:
 - has disclosed all the relevant information that it holds with regard to part 1 of the request
 - does not hold other information that has been requested under part 3(b) of the request; and
 - has correctly applied section 42 to the information it has withheld under part 2 of the request
3. The Commissioner also finds that the Council breached section 10 as it did not provide a response to the request or disclose information within the 20 working days that is a requirement of the Act.

Background

4. A relative of the complainant alleges that their disabled child has been mistreated by staff at Wood Fold School. An investigation that involved Ofsted and the police confirmed that there was no evidence that the child had been mistreated. A report commissioned by the Council found flaws in the School's social care, safeguarding and child protection procedures. The Commissioner is aware that the case has received coverage in the local newspaper.

Request and response

5. On 10 August 2014, the complainant wrote to Wigan Council and requested information in the following terms:

"Please provide the following within 20 working days:-

1. *All correspondence between Wigan Council and You Tube, regarding items on the You Tube website.*
2. *Copies of all advice obtained regarding removal of items from You Tube website.*
3. *Details of all advice and copies of all correspondence between Wigan Council and Wood Fold School staff and Wood Fold School Governing Body regarding:-*
 - (a) *Suspension of [Named Individual 1] from the Governing Body.*
 - (b) *Allegations of mistreatment of [Named Individual 2] by staff at Wood Fold School.*
4. *Copies of correspondence between Wigan Council and BBC re NW Tonight programmes on 2nd and 3rd July 2014."*

6. Following a reminder from the complainant on 11 September, the complainant received a response from the Council on 27 September. The Council had mis-numbered its response to the separate elements of the complainant's request. It said:

- it was withholding information in relation to part 1 as this was exempt under section 40(2) of the FOIA (third person personal data)

- information relating to part 2 was exempt from disclosure under section 42
 - it did not hold information relating to part 3 *[it is not clear to the Commissioner which part this is referring to]*
 - parts 4(a) and 4(b) were exempt from disclosure under section 40(2) *[here the Commissioner assumes the Council was in fact referring to parts 3(a) and 3(b)]*; and that
 - with regard to part 5 *[ie part 4]*, it did not hold information relating to correspondence between the Council and the BBC.
7. The complainant requested an internal review on 27 September and on 6 October the complainant provided the Council with confirmation that their family members were content for the Council to disclose to him the information that it was withholding under section 40(2).
8. The complainant did not receive an internal review and sent reminders to the Council on 21 and 31 October. Following intervention by the Commissioner, the Council provided an internal review on 16 December. The reviewing officer had directed the Council to either disclose to the complainant information relating to part 1, part 3 and part 4 of the request or to issue a refusal notice. The internal review maintained the Council's position regarding part 2 of the request.
9. In the Commissioner's view, the internal review was unsatisfactory as it did not confirm whether the Council was releasing any information in relation to parts 1, 3 and 4 and, if not, what exemption was being applied to it. The Council's review had consequently not progressed the request any further. On 13 January 2015, the Commissioner asked the Council to clarify its position and, following further intervention by the Commissioner, the Council provided a fresh response to the complainant on 17 February.
10. The Council:
- released information in respect of part 1 of the request
 - maintained its position regarding part 2; that this information is exempt under section 42
 - released information in respect of part 3(a), redacting some which it says is exempt under section 40(2)
 - withheld information in respect of part 3(b) which it said was exempt under section 30(2) (investigations and proceedings); and

- withheld information in respect of part 4 which it now said was exempt under section 43.

Scope of the case

11. The complainant originally contacted the Commissioner on 14 November 2014 to complain about the way their request for information had been handled. In February 2015, the complainant confirmed that they are not satisfied with the Council's response following its second review. With respect to part 1, the complainant considers that there is other correspondence that has not been included. Regarding part 2, the complainant is of the view that the Council did not undertake a proper consideration of the public interest arguments for releasing the information.
12. In respect of part 4, the complainant was not convinced that releasing the requested information would be commercially detrimental to third parties. Following intervention by the Commissioner, on 30 March the Council withdrew its reliance on section 43 and disclosed information relating to part 4 with some personal information redacted under section 40(2). The complainant is satisfied with the information they have received under part 4 of their request and it has therefore not been necessary for the Commissioner to investigate the Council's application of the section 43 exemption to this particular information.
13. The complainant also withdrew their complaint in respect of part 3(a) and the Commissioner did not include this in his investigation.
14. The Commissioner's investigation therefore initially focussed on whether the Council had released all the information that it holds in respect of part 1 of the request, the Council's application of section 30(2) to part 3b and its application of section 42 to part 2.
15. During the investigation the Commissioner asked the Council to clarify whether it was applying section 30 or 31 (law enforcement) to part 3b of the request, and reminded it to provide him with the information it was withholding under the exemption. After a considerable delay, the Commissioner found it necessary to issue the Council with an Information Notice to receive this information. On finally reviewing the information that the Council now said it was withholding under section 31 rather than section 30, the Commissioner noted that the information post-dates the complainant's request. This means that the Council did not hold this particular information at the time of the request in August 2014, and it cannot be considered as part of this investigation.

16. The Council went on to tell the Commissioner that it did not hold any information within the scope of part 3b of the request, at the time it received the request. The complainant disputed this assertion. The Commissioner therefore revised this part of his investigation and, with respect to part 3b, considered whether the Council is correct when it says it did not hold information relevant to part 3b at the time of the request.

Reasons for decision

Section 1 – general right of access

17. Section 1(1) of the FOIA says that anyone making a request for information to a public authority is entitled to be informed if the authority holds the requested information and, if the authority does hold it, to have that information communicated to them.
18. In response to part 1 of the request, the Council has disclosed to the complainant email correspondence between it and YouTube regarding video material that has been uploaded to YouTube and which the Council wanted YouTube to remove. The complainant is not satisfied because the correspondence does not appear to contain the Council's original complaint to YouTube.
19. The Council has told the Commissioner that it submitted its complaint through an online form on YouTube's website, which involved filling in a number of 'pages' with a 'Submit' button on completion. The Council has confirmed that it did not save any of these pages to its own systems or take 'screen shots' of any of the pages. It says that consequently it does not hold a copy of its original complaint and maintains its position that it has provided to the complainant all the information in relation to part 1 of the request that it holds.
20. The Commissioner accepts the Council's explanation, which he considers to be credible and genuine. On inspecting the information disclosed to the complainant however, he has noticed at the end of the first email sent by YouTube on 7 July 2014 at 23:57 what appears to the Commissioner to be the original complaint that the Council submitted to YouTube. The Commissioner considers that the Council has simply overlooked this particular aspect when it disclosed the information to the complainant. It begins

"On 07/07/14 07:54:24 [officer]@wigan.gcsx.gov.uk wrote:

Issue Type: Other Legal

Country: United Kingdom...

And ends

"... Therefore, the audio footage needs to be removed"

21. If this is not the Council's original complaint to YouTube, the Commissioner is nonetheless satisfied, for the reasons the Council provided at §19, that it has disclosed all the information related to part 1 of the request that it holds and has met its obligations under section 1 of the FOIA in this respect.
22. The Commissioner next considered the Council's position regarding part 3b of the request – that is, information advice and correspondence between the Council and Wood Fold School staff and governing body about allegations of mistreatment of a named individual by staff at the school. During the Commissioner's investigation the Council told the Commissioner that it had not, in fact, held any relevant information at the time of the request ie 10 August 2014. Having reconsidered the situation following correspondence with the Commissioner, it acknowledged that the information to which it had referred in its correspondence to the complainant and the Commissioner had been generated *after* it had received the complainant's request. Under the FOIA, an applicant is only entitled to information that the public authority holds at the time a request is received. Consequently, the information in question that the Council holds cannot be considered with regard to the request that is the subject of this notice.
23. The complainant does not accept that the Council did not hold any information within the scope of part 3b of their request, at the time he submitted the request. He referred the Commissioner to two items of correspondence that seemed to suggest that the Council *did* hold relevant information at that time.
24. In response to the Commissioner's questioning, the Council has confirmed that it does not hold any information relating to part 3b of the request that pre-dates 12 August 2014 (when it received the request). The Council has told the Commissioner that it has checked the central file that was opened to hold information generated by the independent investigation and a related complaint the Council received. It says that this file does not hold any relevant information pre-dating 12 August. The Director of Children's Services within the Council has confirmed that this would be the place where any relevant information would be found.
25. One item of correspondence to which the complainant referred the Commissioner is an item between the Council and the BBC dated 27 June 2014. This refers to mistreatment allegations being an active case

and mentions particular advice that "was given". The complainant considers that this advice should have therefore been held as recorded information at the time of his request two months later. Having undertaken a search, the Council has told the Commissioner that it cannot find any reference to such advice, in either the central file or in its electronic records. The Council has suggested that the advice may have been given over the phone. In this case it would not have held the information in August 14 as it does not routinely record phone calls or make notes of telephone conversations, as it has no business need to do so.

26. The second item of correspondence to which the complainant referred is the Council's original response, which the complainant received on 27 September 2014. In this letter, the Council refers to "information held in relation to this point" which, at that stage, it was withholding under section 40(2). Having reviewed the letter again, the Commissioner is prepared to accept that the Council was either referring solely to part 3(a) of the request, or to information it also held in relation to part 3(b) but which has subsequently been found to post-date the complainant's request.
27. Having carefully considered both the complainant's and the Council's submissions, the Commissioner has decided that, on the balance of probabilities, the Council did not hold any information within the scope of part 3b of the complainant's request, at the time the request was received.

Section 42 – legal professional privilege

27. Section 42 of the FOIA says that information is exempt if it is subject to legal professional privilege. The Council has applied the exemption at section 42 to part 2 of the request. This concerns information held in email correspondence between the Council and its professional legal advisors, and with these advisors and YouTube, as the Council challenged YouTube regarding the video clips in question.
28. The purpose of legal professional privilege is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and their client remain confidential.
29. There are two forms of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential

communications made for the purpose of providing or obtaining legal advice about pending or contemplated legal proceedings.

30. Advice privilege applies where there is no litigation contemplated or in progress. It also protects confidential communications between a lawyer and their client, and the communications have to be made for the dominant purpose of obtaining or providing legal advice. The Council has confirmed to the Commissioner that it is relying on advice privilege in this case.
31. Having had sight of the emails in question, the Commissioner considers that the information contained in them does constitute legal advice.
32. The Commissioner considers that the legal advice will remain confidential if it has only been shared with a limited number of people on a restricted basis. The Council has told the Commissioner that the email correspondence between its staff and its legal advisors has only been circulated between those parties. The Commissioner is therefore satisfied that the communications have remained confidential.
33. Consequently, he is satisfied that the information is capable of attracting legal professional privilege and therefore is exempt information under section 42(1).
34. This exemption is, however, subject to the public interest test. The public interest test requires the public interest in favour of maintaining the exemption to be weighed against the public interest in disclosing the information. The information can only be withheld if the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.
35. The complainant says that the Council has not given sufficient weight to the public interest arguments for disclosing the information. He notes that the YouTube videos in question had been viewed 6000 times and suggests that the Council wants to keep secret its attempt to prevent information regarding the alleged mistreatment of a disabled child in local authority school being disseminated.
36. The Council accepts there is a public interest in public authorities being transparent and accountable in their decision making.
37. The Council also argues that it is in the public interest that its decisions are informed and based on confidential legal advice.
38. It is accepted by the Commissioner, the Tribunal and the Courts that there is a strong inherent public interest in preserving the concept of legal professional privilege. This reflects the importance given to people being able to consult with their legal adviser in a full and frank manner.

The need to safeguard the openness of these communications is fundamental to the British legal system.

39. In this case therefore, the Commissioner agrees that the relative merit in the public being made aware of the detail of the Council's correspondence with and regarding YouTube, about the removal of particular video clips, is outweighed by the effect that its disclosure could have on requesting and providing legal advice in the future.
40. The Commissioner is therefore satisfied that section 42(1) can be relied on to withhold the information requested in part 2 of the request.

Section 10

41. Under section 10 of the FOIA, public authorities should respond to a request for information promptly and by the twentieth working day following the date of receipt of the request. In this case, the complainant submitted his request on 10 August 2014 and received a response on 27 September 2014. This is a clear breach of section 10.

Other matters

42. The Commissioner has noted the Council's handling of the complainant's request in this case, and its engagement with him during his subsequent investigation. Both fell below the expected standard and this resulted in unnecessary delays in resolving the complaint. The Commissioner considers that the Council's performance could have been improved if:
 - it had responded to the complainant's original request within 20 working days
 - the response it had then provided in September 2014 had been accurate and clear
 - it had provided an internal review within 20 working days (and no longer than 40) that resulted in its position being confirmed or information being identified and or/released at that point
 - it had considered more carefully what, if any, exemptions applied to particular information that it held at the time it received the request, rather than applying, and withdrawing, exemptions during the investigation
 - it had responded to the Commissioner's correspondence in a timely manner and kept him updated on any delays

- better understood a basic feature of the FOIA; that public authorities are only obliged to release (or issue a refusal notice with regard to) information that they hold at the time they receive a particular request.
43. The Commissioner's guidance on handling information requests under the FOIA is available on his website at <https://ico.org.uk/for-organisations/guide-to-freedom-of-information>

Right of appeal

28. 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

29. 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.
30. 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

Pamela Clements
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