

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 April 2018

**Public Authority:** Scarborough Borough Council  
**Address:** Town Hall  
St Nicholas Street  
Scarborough  
YO11 2HG

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from Scarborough Borough Council, such as swimming pool sample results and visual checks, in relation to an investigation about a local leisure facility. The Council refused the request on the basis of section 30(1) of the FOIA.
2. The Commissioner's decision is that section 30(1)(b) is engaged. However she finds that the public interest in disclosure outweighs the public interest in maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information it holds within the scope of the request
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Request and response**

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5. On 20 June 2017, the complainant wrote to Scarborough Borough Council ("the Council") and requested information in the following terms:

*"I seek the following information from Everyone Active Whitby:-*

- Pool sample results taken Friday 9<sup>th</sup>, Saturday 10<sup>th</sup>, Sunday 11<sup>th</sup> and Monday 12<sup>th</sup> June 2017*
- Details of the cleaning schedule which took place on Monday 12<sup>th</sup> June*
- All details of the small pool including all visual checks from this time period*
- Pool sample results taken by your independent lab prior to Tuesday 12<sup>th</sup> June*

*I would be interested in ALL information you hold for this time frame for the small pool at Everyone Active, Whitby regarding my request."*

6. The Council responded on 18 July 2017 and confirmed that it held information relevant to the request but considered it exempt from disclosure by virtue of section 30(1) of the FOIA.
7. Following an internal review the Council wrote to the complainant on 17 August 2017. It stated that it maintained its position that the information it held was exempt from disclosure under section 30(1).

### **Scope of the case**

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8. The complainant contacted the Commissioner on 17 August 2017 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the Council has correctly applied any of the provisions of section 30(1) and, if so, where the balance of the public interest lies.

### **Reasons for decision**

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#### **Is the information environmental?**

10. Whilst the Council responded to the request under the FOIA, the Commissioner did explore with the Council whether the information may fall under the definition of environmental information as set out in regulation 2(1) of the Environmental Information Regulations 2004 (EIR).

11. Regulation 2(1)(a) states that information can be environmental information if it relates to the state of the elements of the environment, such as water. Regulation 2(1)(b) refers information on discharges or releases into the environment that may affect any of the elements at (a) and regulation 2(1)(f) refers to information on the state of human health and safety that may be affected by the state of any elements or by discharges or releases such as those listed at (b).
12. The Commissioner has, in previous cases<sup>1</sup>, found that information on test results can be environmental. However, this is in cases where it was established that particular bacterial outbreaks had occurred and this could be spread to one of the elements in (2)(1)(a). However, in this case, whether there was or was not a bacterial issue that falls within the definition of a discharge or release it would not seem to impact on any of the elements listed at (a). The swimming pool is wholly contained indoors and does not interact with any natural elements of the environment. Therefore based on the information available to the Commissioner she has concluded the information held is not environmental and the Council correctly considered the information request under the correct access regime, the FOIA.

### **Section 30 – investigations and proceedings conducted by public authorities**

13. Section 30(1)(a) provides that information is exempt if it has been held at any time for the purposes of any investigation conducted by the public authority with a view to ascertaining if a person should be charged with an offence or is guilty of an offence they have been charged with.
14. Section 30(1)(b) provides that information is exempt if it has been held at any time 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 the power to conduct.
15. The phrase “at any time” means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.

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<sup>1</sup> FER0622459

16. Section 30 is also a class based exemption. This means that it is not necessary to demonstrate that disclosure would lead to any kind of prejudice in order to engage the exemption, only that the request falls within the class of information which the exemption is designed to protect. Section 30(1) can only be relied upon by public authorities that have a duty to investigate whether someone should be charged with an offence.
17. The withheld information in this case comprises sampling results from the swimming pool as well as logs from Everyone Active. This information was held by the Council as part of an investigation to determine if any person should be charged with an offence. The Council has stated it has a legal duty to investigate health and safety issues under the Health and Safety at Work Act 1974 and other regulations made under this such as the Health and Safety (Enforcing Authority) Regulations 1998 and the Management of Health and Safety at Work Regulations 1999.
18. The Commissioner has reviewed the withheld information and is satisfied that the information was obtained by the Council to assist in investigating if a potential criminal breach of Health and Safety legislation had been committed. It seems clear that the Council has the power to investigate such potential breaches of Health and Safety legislation and to institute proceedings. Therefore, the Commissioner is satisfied that the section 30(1)(b) exemption is correctly engaged and she has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

*Public interest factors in favour of disclosure*

19. The Council acknowledges there is a public interest in ensuring that law enforcement bodies undertake their duties appropriately, and that potential offences are investigated and prosecuted properly. Disclosure of information relating to the investigation of regulatory offences would likely go towards satisfying this interest and therefore increase public confidence in the Council's enforcement role.
20. The Council also recognises the public interest in transparency and accountability, particularly in how it conducts its functions.
21. The complainant argues there is a strong public interest in the release of this information as there were questions over the condition of the swimming pool during the time period covered by the request and it is therefore important for members of the public to be fully aware of the outcome of the investigation so as to be able to make informed decisions about using the facilities.

*Public interest factors in favour of maintaining the exemption*

22. The Council argues there is a public interest in regulatory bodies being able to undertake investigations and bring prosecutions where appropriate. Disclosure of the information in question would likely prejudice these functions and any future investigations. The Council states it has good working relations with the vast majority of those it is required to regulate. Should it be the case that the Council were to be seen to disclose information received as part of an investigation, it argues that those businesses and individuals may become unwilling to cooperate and/or supply information moving forward. This would not only be prejudicial to the Council's enforcement functions, but would also put the public at risk. It would also result in a delay to investigations and the need to use additional resources in order to retrieve information which would ordinarily have been provided in a cooperative manner.

23. The Council accepts that the specific investigation in question has concluded and this does reduce the strength of the argument in favour of maintaining the exemption somewhat. However, it considers there is no evidence to suggest the investigation was not carried out properly and thus no benefit to disclosing the information.

24. The Council refers to paragraph 55 of the Commissioner's guidance on section 30<sup>2</sup> which states that :

*"tribunals have been guided by the White Paper, "Your Right to Know", which preceded the introduction of FOIA. In Patrick Toms v Information Commissioner (EA/2005/0027 19 June 2006) the Information Tribunal quoted from the White Paper when explaining the interest protected by section 30, "...should not undermine the investigation, prosecution or prevention of crime, or the beginning of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt."*

*Balance of the public interest arguments*

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

25. The Commissioner accepts that there is a strong public interest in accountability and transparency on the part of public authorities such as Councils. She also accepts that there is a public interest in the public scrutinising the investigative processes of a public authority and being confident that the public authority is discharging its statutory functions. The Commissioner accords significant weight to these public interest arguments.
26. The Commissioner notes that the Council has not expanded on its arguments for considering it would not be in the public interest to disclose the requested information beyond simply stating that disclosure would prejudice its ability to undertake investigation by undermining its working relationships and its ability to receive information needed to conduct investigations.
27. The Commissioner notes that these arguments are used also with regard to many 'prejudice-based' exemptions. In such cases, the public authority would be required to demonstrate the likelihood of the prejudice. Since section 30 is a 'class-based' exemption, the Commissioner cannot require this, however she has given consideration to the Council's arguments.
28. The Commissioner accepts, to some extent, the argument that there may be an impact on its ability to persuade other parties to voluntarily provide it with information needed as part of its investigation if it is expected that this information may be made available to the public. However, the weight attribute to this argument is greatly reduced by two factors: the investigation had concluded and the Council has the ability to use powers in the Health and Safety at Work Act 1974<sup>3</sup> to require the provision of information.
29. Turning to the latter of these points first; section 27 of the aforementioned Act sets out the powers of the enforcing authority to serve a notice on any person requiring the provision of any information that may be needed for the investigation. Disclosing the withheld information in this case is therefore unlikely to impede any future investigation as the Council has powers to compel parties to provide information it requires. The Commissioner cannot completely dismiss this argument and she acknowledges there is a possibility that some parties may perceive a disclosure of information held as part of an investigation to be a cause for caution and consequently be reluctant to

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<sup>3</sup> <https://www.legislation.gov.uk/ukpga/1974/37/part/I/crossheading/obtaining-and-disclosure-of-information>

interact with the Council voluntarily. If the Council were to need to rely on their formal powers to obtain information in every case then this would be likely to slow the investigative process to some degree.

30. That being said, the other factor to consider in this case is that the investigation that this case relates to had concluded. By the Council's own admission this does weaken the arguments for withholding the information. The Commissioner considers this to be of importance in this case. To engage section 30 it only needs to be shown that the information in question was held at any time by the public authority; when considering the public interest in disclosure the timing of the request and investigation is of more relevance.
31. Clearly, disclosing the withheld information would not have had an impact on the investigation as it had concluded. The question is therefore whether disclosing the information would impact on future investigations. The Commissioner's view is that the likelihood of parties being reluctant to voluntarily provide information to the Council would be higher if it was seen that information relating to ongoing investigations might be disclosed, instead of information relating to concluded investigations. The Commissioner does not therefore consider this argument carries much weight.
32. The Commissioner has also taken into account the public interest arguments put forward by the complainant. She accepts that any alleged incident at a public swimming pool, especially one in which it is alleged there has been an possible bacterial outbreak will create some degree of public interest in understanding what has or has not happened. More importantly there will be a strong public interest in information which shows how the incident has been investigated. The information that has been requested is not information that will show how the Council investigation took place but it would show the sort of information that is looked at when decisions are made about whether action should be taken. It would also go some way to showing whether there was an incident and allow for informed decisions to be made by users of the facilities.
33. On balance, having viewed the withheld information and taken into account all public interest arguments for and against disclosure, the Commissioner has concluded that the public interest in reassuring the public and being transparent about what took place is significant and that therefore the public interest in disclosure outweighs the public interest in maintaining the exemption.



## Right of appeal

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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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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.

**Signed .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**