

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2019

Public Authority: Homes for Haringey
Address: River Park House
225 High Road
Wood Green
London N22 8HQ

Decision (including any steps ordered)

1. The complainant has requested information from Homes for Haringey ('HfH'); an arm's length organisation of the London Borough of Haringey and a public authority in its own right for the purposes of the FOIA. The information is associated with an audit report that a Homes for Haringey Resident Scrutiny Panel (RSP) produced, which concerned the Haringey Leaseholders Association.
2. HfH has withheld information under section 41(1) of the FOIA (information provided in confidence) and considers that it is also exempt under section 40(2)(third person personal data). HfH says other information it holds is exempt information under section 21 (accessible to applicant by other means) and that it does not hold some of the information the complainant has requested.
3. The Commissioner's decision is as follows:
 - The information requested in request [1] – the full audit report - is exempt information under section 41(1).
 - On the balance of probabilities, HfH does not hold some of the information requested in request [2], namely full written notes associated with interviews, and has complied with section 1(1)(a) in this regard.

- Some of the information that HfH holds that falls within the scope of request 2 is exempt information under section 21(1) as it is accessible to the complainant by other means.
 - The remainder of the information that HfH holds relating to request 2 and that falls within the scope of this investigation – emails, letters, financial information and summaries of notes of interviews with third persons – is exempt information under section 41(1).
4. The Commissioner does not require HfH to take any remedial steps.

Background

5. The matter of the Resident Scrutiny Panel (RSP) report in question was the subject of the Commissioner's decision in FS50659038¹ on 7 June 2017. That case concerned a request from the complainant for the recommendations in the audit report on Haringey Leaseholders Association (HLA). The Commissioner understands that the report was a response to complaints about bullying and mismanagement on the part of the HLA.
6. HfH said it did not hold the report in question but the Commissioner found that the RSP held the information on behalf of HfH and she ordered HfH to issue the complainant with a fresh response to his request.
7. HfH then wrote to the complainant on 11 July 2017, providing that fresh response. It noted that the Commissioner considered that the RSP was acting on behalf of HfH in commissioning the RSP to provide the report and therefore the recommendations, if they exist, "*should be requested*" (this point is not clear to the Commissioner). HfH stated that it considered that the Commissioner's decision was contrary to a Court judgment in 2015. HfH said it had nevertheless discussed the Commissioner's decision with the RSP and requested the recommendations from it.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2014257/fs50659038.pdf>

8. HfH released a copy of the recommendations to the complainant. It reiterated its position that, prior to requesting the recommendations in response to the Commissioner's decision, HfH did not itself hold these report recommendations.
9. HfH continued that its position was that the report's recommendations were exempt from disclosure in so far as they form part of the HLA audit report in question, which it said is exempt from disclosure under section 30 and/or section 40 of the FOIA. HfH said that, nonetheless, without prejudice to that position, in the interests of transparency and bringing the matter to a conclusion, it would disclose the table of the full recommendations as set out in the RSP report concerning the HLA.

Request and response

10. On 26 July 2017 the complainant wrote to HfH and requested information in the following terms:

"[1] We note that you have said you believe the rest of the report (and the evidence on which it was based) is exempt under sections 30 and / or 40 of the FOI Act. Can we ask for this to be reviewed? Without going into details at this stage could we ask that some compromise, for instance the redaction of names, be considered? The HLA has emphatically never sought to intimidate anyone. Of course there have been some difficult situations all round."

"[2] I would also like to ask you to give special consideration to releasing the documents and notes relating to the interviews I took part in myself (as well as those of other committee members such as [Name 1 Redacted] and [Name 2 Redacted] as I think these are not subject to the same confidentiality concerns."

11. HfH responded to both requests on 28 July 2017. It said it did not hold the information (ie the report in question) but indicated that it would seek advice about reviewing "the decision" and would ask the RSP if it was prepared to release the requested information.
12. HfH indicated to the Commissioner that it was prepared to waive an internal review. However, during the Commissioner's investigation, in correspondence to the complainant dated 25 October 2018, HfH confirmed its position, effectively providing an internal review. HfH confirmed it is relying on sections 41 and 40 to withhold the information it holds within the scope of request 1. HfH confirmed it does not hold some information relating to request 2 and is again relying on sections 41 and 40 to withhold the information it does hold.

Scope of the case

13. The complainant first contacted the Commissioner on 9 November 2017 to complain about the way his request for information had been handled. In February 2018 the complainant asked for progression of his complaint to be suspended for a period and the case was re-opened and progressed on 1 May 2018.
14. The Commissioner's investigation has first focussed on request [1] and whether this information is exempt in its entirety under section 41(1) of the FOIA. If necessary, she has been prepared to consider whether the information is exempt under section 40.
15. The Commissioner has next considered request [2]; whether HfH holds all the information the complainant has requested; whether some information it holds is exempt from release under section 41(1) or section 40(2) in the alternative; and, having considered HfH's submission to her, whether some of the information is exempt under section 21(1).

Reasons for decision

REQUEST 1

16. Request 1 is for the body of the RSP audit report, which HfH says is exempt information under section 41(1) and section 40(2). HfH resisted providing a full and unredacted version of the audit report to the Commissioner. Despite assurances to the contrary, HfH considered – erroneously – that there was a risk that the Commissioner would disclose particular information to the complainant. The Commissioner advised HfH that, under section 51 of the FOIA, the Commissioner can serve an information notice on a public authority in order to be provided with all the information she needs to make a decision. On this occasion, however, the Commissioner was prepared to accept the RSP audit report's executive summary and recommendations, in the first instance, and she has reviewed this material.

Section 41 – information provided in confidence

17. Section 41(1) of the FOIA says that information is exempt information if
 - (a) it was obtained by the public authority from any other person and
 - (b) disclosing the information to the public (otherwise than under the Act) would constitute a breach of confidence actionable by that or any other person (ie the aggrieved party would have the right to take the

authority to court as a result of the disclosure and the court action would be likely to succeed).

18. Although section 41 is an absolute exemption and is therefore not subject to a public interest test under the FOIA, the common law duty of confidence contains an inherent public interest test.

41(1)(a) – was the information obtained from another person?

19. As has been discussed above, the Commissioner has previously found that HfH holds particular information by virtue of the fact that the RSP was holding it on HfH's behalf: the RSP was acting on HfH's instruction. Further, the Commissioner's view is that by engaging with the RSP during the audit report process individuals were, in effect, engaging with HfH.

20. In its submission dated 27 July 2018 HfH says that the information in the report produced by the RSP (and which HfH commissioned the RSP to undertake) was obtained – directly and indirectly - from its staff, individual leaseholders and members of the HLA with whom the RSP held confidential interviews. The Commissioner is satisfied that this information was obtained by another person and that the condition under section 41(1)(a) has been met with regard to request [1].

41(1)(b) – would disclosure constitute an 'actionable' breach of confidence?

21. When determining if disclosure would constitute a breach of confidence, a public authority will usually need to consider:
 - whether the information has the quality of confidence
 - whether it was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

22. Information will have the necessary quality of confidence if it is more than trivial and is not otherwise accessible.
23. With regard to request [1], HfH says that the individual leaseholders concerned (and, the Commissioner assumes, any other individuals interviewed) attach significant importance to the information they disclosed to the RSP because the report concerns complaints about bullying and mismanagement. HfH has confirmed that the report is not

otherwise accessible. Given these two factors the Commissioner is satisfied that the report requested in request [1] has the quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

24. As above HfH says that the information was obtained from people with whom the RSP held confidential interviews. It says that the RSP's instructions to its Panel interviewers included a statement to be given at the start and end of each interview with the individuals that they interviewed, noting that the interview was confidential and that all information given to the RSP during the interview would be treated confidentially. Members of the RSP also signed confidentiality agreements and were subject to a Code of Conduct which emphasised the confidential nature of the RSP's work. As an example, its Service Standards note that minutes of monthly RSP meetings would be treated as confidential. HfH has also told the Commissioner that the RSP's Interview Fact Sheet within the Code of Conduct regarding interviews to be carried out that required actions on the day of an interview included: *"Reassure people about confidentiality (and ensure this is maintained!)"*.
25. A similar instruction was associated with telephone interviews.
26. In its submission HfH states that it is clear that the information individuals provided to prepare the report, and indeed their agreement to be involved in the investigation at all, was heavily predicated on such involvement and information being provided in circumstances importing an obligation of confidence. HfH has provided the Commissioner with copies of emails in which certain individuals seek assurance that information associated with the report will not be released and that they will not be identified.
27. HfH has also explained that HfH employees, and leaseholders, who provided information to the RSP relied on HfH's Whistle Blowing policy and the provisions within it to provide assurance that they would be protected and their concerns treated confidential.
28. HfH has provided the Commissioner with sufficient evidence to persuade her that the information requested in request [1] - that is, the report - was derived from information imparted in circumstances importing an obligation of confidence.

Would disclosing the information be an unauthorised use of the information to the detriment of the confider?

29. The Commissioner's published guidance on section 41(1) establishes that case law now suggests that *"any invasion of privacy resulting from*

a disclosure of private and personal information can be viewed as a form of detriment in its own right".

30. The Commissioner considers that the information contributors to the report provided constitutes information of a personal and sensitive nature. Its release may well cause those individuals a degree of strain, damage or distress. It is therefore not necessary for there to be any detriment to the confiders in terms of tangible loss, for this information to be protected by the law of confidence. Therefore the Commissioner has not considered this issue further.
31. With regard to request [1] the Commissioner has therefore found that the condition under section 41(1)(b) has also been met: the information in question has the necessary quality of confidence; it was imparted in circumstances importing an obligation confidence and disclosing it would be an unauthorised use of the information to the detriment of the confider.
32. Section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test contained at section 2 of FOIA. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).

Public interest in disclosing the information

33. With regard to both parts of the request, there is a public interest in HfH demonstrating that it is open and transparent.

Public interest in withholding the information

34. With regard to request [1], HfH considers that disclosing the report would seriously undermine the relationship of trust between the confiders and HfH and the RSP. If this trust is breached, HfH says the credibility of the RSP's functions and the report itself, as well as HfH's ability to monitor the workings of the HLA and any other of its associated organisations in the future will be undermined.

Balance of the public interest

35. The audit report and the associated material may be of interest to the complainant but the Commissioner has not been persuaded that it has any wider public interest, focussing as it does on a very localised issue. Maintaining trust between HfH and its associated organisations is important; confiders to the report engaged in producing the report on the understanding that information they provided would be treated

confidentially. HfH has demonstrated a degree of transparency by releasing to the complainant the audit report's recommendations. The Commissioner is therefore satisfied that in the circumstances of this case the balance of the public interest favours withholding the information requested in request [1].

36. With regard to request [1], the Commissioner is satisfied that both 41(1)(a) and 41(1)(b) have been met and that the requested information is exempt information under section 41(1) of the FOIA as it is information provided in confidence. She finds that the balance of the public interest favours maintaining this exemption. Since the audit report in its entirety engages the section 41(1) exemption it has not been necessary to consider HfH's application of section 40 to this information. The Commissioner has gone on to consider HfH's response to request 2.

REQUEST 2

37. Request 2 is for the documents and notes relating to the interviews that the RSP undertook. HfH's position is that it does not hold some of this information and that the information it does hold is exempt information under section 41(1), section 40(2) and section 21(1).

Section 1 – general right of access to information public authorities hold

38. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled a) to be told if the authority holds the information and b) to have the information communicated to him or her if it is held, and is not exempt information.
39. During the Commissioner's investigation the complainant confirmed to HfH that the 'notes' he is referring to in request 2 are any notes the interview panel took of what took place during the interviews: notes taken during the interviews and those subsequently written up.
40. In its initial submission dated 27 July 2018 HfH advised the Commissioner that given the passage of time since the RSP's interviews were conducted and the report produced (ie 2014), the full written interview notes are no longer held. HfH says that the RSP was only required to submit to it a summary of the RSP's report and its recommendations in final version. HfH says that the RSP therefore destroyed the full written interview notes as part of its usual course of business following the report's submission.
41. In a second submission that HfH provided dated 29 January 2019, HfH confirmed that it does not hold full written interview notes but does hold notes that are a summation of key points from various interviews that

were conducted. The matter of this summary information is discussed below and under the 'Section 41' analysis.

42. The Commissioner accepts that, on the balance of probabilities, HfH no longer holds the full written notes associated with the RSP's interviews. This is because of the length of time between the interviews and the request for information – approximately three years. In addition, the Commissioner has noted that the RSP was not required to keep these notes because its task was solely to provide HfH with a summary of its report and its recommendations. The Commissioner finds that HfH has complied with section 1(1)(a) with regards to the full written notes.
43. In request [2], the complainant also requested documents related to the RSP interviews. During the Commissioner's investigation the complainant confirmed to HfH that the documents to which he is referring are all those that the RSP used to prepare the questions for the interviews. In the second submission dated 29 January 2019 HfH says the interviews in question took place approximately between June and September 2014. On that basis HfH says it has excluded any documents that were created after September 2014 (based on the description and file name of the document). It has identified 47 documents that fall outside of this date range which it considers therefore fall outside the scope of the request.
44. HfH says it has also identified that a further 27 documents would not have been used to prepare questions for interviews and have been excluded on the same basis – these relate to public leaflets, HfH's strategies, procedures and standard agreements (such as room hire and confidentiality.)
45. In addition there are a further 99 documents that HfH has excluded on the basis that they are already available in the public domain or are otherwise already reasonably accessible to the complainant. They include correspondence to and from HfH and/or the scrutiny panel and the HLA; legal correspondence with the HLA's solicitors; HLA committee meeting minutes; court letters; press cuttings and an earlier decision notice by the Commissioner. From the submission HfH provided dated 29 January 2019, HfH has referred to section 21(1) with regard to this information. This will be discussed at the conclusion of this notice.
46. HfH has confirmed to the Commissioner that it holds 100 documents that, from a desktop exercise, potentially match the complainant's criteria. These documents broadly fall into the following categories:
 - (i) Letters and emails from individual leaseholders and former members of the HLA which contain personal and sensitive

information and which were provided to the scrutiny panel in confidence

- (ii) Bank details and financial transactions
- (iii) Interview notes and interview notes summary from interviews with members of the HLA, including the complainant and the two other individuals referred to in the request
- (iv) Extracts from the draft scrutiny panel report.

47. HfH considers that the category (i), (ii) and (iii) information is exempt from release under section 41 and 40.
48. The matter of the scrutiny panel report at (iv) has already been discussed elsewhere in this notice.
49. The Commissioner will first consider some of the category (iii) information HfH is withholding that specifically relates to the complainant. She will go on to consider whether the category (i) and (ii) information and the remaining category (iii) information engages section 41(1), in the first instance.

Section 40 – Personal data

50. In the 29 January 2019 submission HfH says that some of the category (iii) information comprises bullet point summaries of interviews with the complainant himself. It says it is content to release this information to the complainant. As such the Commissioner does not intend to consider that specific information further except to remind HfH that it is exempt information under section 40(1) of the FOIA (as it is the complainant's own personal data) and HfH should release the information to him under the data protection legislation as it has indicated it would do.
51. HfH has confirmed that other summary notes it holds relate to interviews with two members of HLA that the complainant refers to in his request. HfH seems to suggest in its submission that this information is exempt under section 40 only; however the Commissioner understands from her conversations with HfH that it also considers that this information is also information that was given in confidence and, as such, is exempt under section 41(1).

Section 41 – information provided in confidence

52. As above, the information to which HfH has applied section 41(1) comprises letters and emails from leaseholders and former members of the HLA and bank details and financial transactions. HfH says that this was information that individuals directly provided to the scrutiny panel

in confidence. The information also includes summary notes of interviews the RSP had with the two individuals named in the complainant's request. The Commissioner will consider whether the information held in those notes was, effectively, given to the scrutiny panel in confidence.

53. HfH has provided the Commissioner with four representative examples of the first category of information – the letters and emails, which she has reviewed. The Commissioner is less concerned with the content of this material and more concerned with whether this information, irrespective of its sensitivity, was passed to HfH (through the RSP) in confidence.

41(1)(a) – was the information obtained from another person?

54. In its submission dated 29 January 2019 HfH has said that some of the the information – copies of emails and letters and financial information – was obtained from another person, namely leaseholders and former members of the HLA. It appears to the Commissioner that this information was directly passed to HfH.
55. The remainder of the information – the content of summaries of notes of interviews – was more indirectly obtained from another person, namely the two former members of the HLA. It was nonetheless obtained from these individuals; they provided it to the RSP in response to the RSP's questioning.

41(1)(b) – would disclosure constitute an 'actionable' breach of confidence?

56. What an authority will usually need to consider when determining if disclosure would constitute a breach of confidence has been detailed at paragraph 21.

Does the information have the necessary quality of confidence?

57. As above, information will have the necessary quality of confidence if it is more than trivial and is not otherwise accessible.
58. And as with request [1] the individual leaseholders concerned and, any other individuals interviewed, will attach significant importance to the information they disclosed to the RSP because the report concerns complaints about bullying and mismanagement. Given these two factors the Commissioner is again satisfied that the information in question relating to request [2] has the quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

59. The reasoning that HfH gave with regard to request [1] and which is given at paragraph 24 to 27 applies equally with regard to request [2].
60. The Commissioner is persuaded that the information in question relating to request [2] - that is, the emails, letters, financial information and summary notes - was derived from information imparted in circumstances importing an obligation of confidence.

Would disclosing the information be an unauthorised use of the information to the detriment of the confider?

61. The Commissioner's reasoning on this point is given at paragraph 30 and applies equally here. With regard to request [2] the Commissioner again finds that the condition under section 41(1)(b) has also been met: the information in question has the necessary quality of confidence; it was imparted in circumstances importing an obligation of confidence and disclosing it would be an unauthorised use of the information to the detriment of the confider.
62. For the reasons given in the analysis of request [1] the Commissioner is satisfied that in the circumstances of this case the balance of the public interest also favours withholding the information requested in request [2].
63. With regard to request [2], the Commissioner is satisfied that both 41(1)(a) and 41(1)(b) have been met. The information being withheld under section 41(1) of the FOIA is exempt information as it is information provided in confidence. The Commissioner finds that the balance of the public interest favours maintaining this exemption. Since all this information engages the section 41(1) exemption it has not been necessary to consider HfH's application of section 40 to it.

Section 21 – information accessible to applicant by other means

64. Section 21(1) of the FOIA says that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
65. Section 21(1) provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.

66. In its 29 January 2019 submission HfH has explained that it holds 99 documents that fall within the scope of request 2 and that it has excluded on the basis that they are already available in the public domain or are otherwise already reasonably accessible to the complainant. To repeat, the documents include correspondence to and from HfH and/or the scrutiny panel and the HLA; legal correspondence with the HLA's solicitors; HLA committee meeting minutes; court letters; press cuttings and an earlier decision notice by the Commissioner.
67. At the time of the request (which is the focus for the Commissioner) the complainant was, and perhaps remains, a member of HLA. As such the Commissioner is satisfied that at the time of the request the complainant would have had access to the information referred to above and, if he remains a member, would still have access to it. In the case of press cuttings and the Commissioner's earlier decision, the complainant would have access to these as a general member of the public.
68. The Commissioner is satisfied that HfH has correctly applied section 21(1) to some information as it is accessible to the complainant by other means. Although HfH may hold this information, the information engages the section 21(1) exemption and HfH is not obliged to release it to the complainant.

Right of appeal

69. 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

70. 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.
71. 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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Wycliffe House
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