

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 February 2019

Public Authority: Sandwell Metropolitan Borough Council

Address: Sandwell Council House
Freeth Street
Oldbury
B69 3DE

Decision (including any steps ordered)

1. The complainant has requested information from Sandwell Metropolitan Borough Council ('the council') regarding allegations made into the conduct of a councillor and the investigation and report that followed. The request included interview statements, correspondence and communications between named and unnamed individuals. Although the council provided some information, the majority of it was withheld under section 12 (cost of compliance), section 30 (investigations and proceedings), section 40(2) (third party personal data), section 41 (information provided in confidence) and section 42 (legal professional privilege).
2. The Commissioner's decision is that the council was entitled to rely on sections 30(1)(a)(i) and (ii) and 30(1)(b), 40(2) and 42(1) to withhold this information. However, the Commissioner finds that the council has breached section 10(1) of the Act in that it failed to provide a valid response to the request within the statutory time frame of 20 working days. She also finds that the council did not correctly apply section 12(1) to part of the information, though the passage of time means that the Commissioner is unable to order any steps in respect of this. With regard to its application of section 12(1) the council also breached section 16 of the FOIA by failing to provide adequate advice and assistance to aid the complainant.

3. The Commissioner does not require the council to take any steps.

Request and response

4. On 12 January 2017 the complainant wrote to the council and requested information in three parts under the FOIA. The request asked for information relating to an investigation conducted by the council into allegations that had been made against a named councillor. The request has been included in a confidential annex due to the nature of its contents. However, to aid understanding of the decision notice, the request is listed below without the personal data included in the original:

- 1.1 – copies of report;
- 1.2 – identify the investigators;
- 1.3 – legal opinion and fees;
- 1.4 – legal correspondence/statements/interviews;
- 1.5 – correspondence/records of named staff member regarding initial investigation;
- 1.6 – correspondence/records concerning potential data protection breach investigation;
- 1.7 – correspondence/communications between two named members of staff regarding a particular allegation and the outcome. Notes and records of any other individual involved in the process;
- 2.1 – persons present at a meeting on a certain date to discuss one of the allegations;
- 2.2 – statements of named individuals;
- 2.3 – series of questions/request for statements regarding allegation two;
- 2.4 – statements regarding allegation three;
- 2.5 – statements regarding allegation four;
- 2.6 – emails and statements regarding allegation five;

- 2.7 – no information requested;
 - 3.1 – any information held regarding decision to reopen enquiry;
 - 3.2 – statements/interview records/any information relating to this matter to include statements of named councillors;
 - 3.3 – copy of final version of unredacted report.
5. On 9 March 2017 the council provided a late response to the complainant.
6. The council provided information under 2.1. It withheld information under sections 12, 30, 40, 41 and 42 as follows:
- Section 30 – 1.1, 1.5, 1.6, 3.1 and 3.3
Section 40 – 1.2, 2.1 – 2.6, 3.2
Section 41 - 2.2 and 2.4
Section 42 – 1.3, 1.4, part of 1.7
Section 12 – part of 1.7
7. The complainant asked for a review on 24 March 2017. He commented on all parts of the council's response and explained that he had not actually requested any documentation under 2.7.
8. The review was not provided to the complainant until 2 November 2018, after the Commissioner had reminded the council on 9 May 2018 that it needed to do so. The review maintained some of the exemptions in the original refusal notice but revised its opinion regarding some of the requested information –
- Disclosing the personal data it had withheld at 1.2.
 - Providing information about legal costs at 1.3 but maintaining the application of section 42 to the rest.
 - Information not subject to legal professional privilege was disclosed under 1.7.
 - The cabinet member's names under 2.1 were provided but any other individuals present were not named, as previously.

- Under 2.2 the council applied section 41 as well as the section 40(2) exemption it had previously applied.
 - The council explained that all statements would fall under section 40(2). Although not directly referred to, this would include the part of 1.4 where the statement of a named councillor was requested.
 - The council extended its application of section 30 to 2.4.
 - The council also decided to disclose some of the emails it had previously withheld as subject to legal professional privilege, but these were not finally disclosed until 17 December 2018.
9. The Commissioner has been provided with the withheld information in order to consider this complaint.

Scope of the case

10. The complainant contacted the Commissioner on 16 April 2018 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of this complaint to be whether the council correctly applied sections 12, 30, 40, 41 and 42 to the withheld information.

Reasons for decision

Section 40(2) – Personal information

12. At the time of compliance with the request, the relevant legislation in respect of personal data was the Data Protection Act 1998 (“the DPA 1998”). The determination in this case must therefore have regard to the DPA 1998, and the terms of the FOIA that were applicable at that time.
13. Section 40(2) states that:
- “Any information to which a request for information relates is also exempt information if–*
- (a) it constitutes personal data which do not fall within subsection (1), and*

(b) either the first or the second condition below is satisfied."

14. Section 40(3) of the FOIA explains the following -

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles..."

Is the withheld information personal data?

15. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA 1998.

16. Personal data is defined by section 1 of the DPA 1998 as:

"...data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession

of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..."

2.1

17. The complainant asked for the staff members present at a Leader's meeting on or around a certain date. At the time of the review the council provided the names of Cabinet members but withheld any other names.

Part of 1.4, 2.2-2.6 and 3.2

18. The Commissioner has reviewed the withheld information and it consists of statements/interviews from various individuals which have times, dates and locations included. Within this information is the personal data of other third parties. The Commissioner considers that the information is biographical and contains information both about alleged incidents involving clearly identified individuals and information about the third parties providing the statements. The withheld information in 1.4 and 2.1-2.6 is clearly personal data. The Commissioner is not able to provide any further details.

Does the information contain any sensitive personal data?

19. Sensitive personal data is defined in section 2 of the DPA. It is personal information which falls into one of the eight categories set out in section 2 of the DPA.
20. Having reviewed the withheld information, the Commissioner is satisfied that some of the withheld information is sensitive personal data within the categories listed in the DPA 1998.

Would disclosure breach the data protection principles?

21. Schedule 1 of the DPA 1998 sets out the data protection principles. The first data protection principle says personal data should only be disclosed if it is fair and lawful to do so. The conditions for releasing personal data are set out in schedule 2.
22. The Commissioner has identified the first data protection principle as relevant to this request. The principle requires the following –

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”
23. In considering whether it would be fair to release this information the Commissioner needs to balance the reasonable expectations of the data subject/s and the potential consequences of disclosure set against the legitimate public interest there may be in disclosing this information.

Reasonable expectations

24. The complainant has an interest in local politics and his view is that members of the council staff are not entitled to anonymity. He further argues that the council itself disclosed information on its website in reports such as the Gowling Report which did name certain individuals, thus setting a precedent for releasing the personal data of members of staff. He does not accept that employees have a blanket right to anonymity and that they affix their names to all documents and reports that are in the public domain.
25. It is the council's view that none of the individuals could have envisaged that this particular information would be shared and that they have not consented to its release.

Consequences of disclosure

26. The council provided the Commissioner with some background information that cannot be disclosed here but it supports the view that the consequences of release would be detrimental. The Commissioner considers that the repercussions could be severe, both to the third parties concerned and the council itself.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

27. The Commissioner accepts that the release of the information relating to 1.4, 2.2-2.6 and 3.2 would be outside the reasonable expectations of the data subjects concerned as witness statements and interviews are considered confidential. To release them would be unfair and cause distress to those concerned which would be in breach of the first data protection principle.
28. The Commissioner also considers that any disclosure of information at 2.1 beyond what the council has already disclosed, to be unfair because it could potentially confirm or not the complainant's speculations and direct unwanted publicity to the individual/s concerned.
29. For the reasons given above, the Commissioner concludes that the disclosure of the third party personal data requested would be unfair as it is exempt under section 40(2) of the FOIA by virtue of section 40(3)(a)(i).

Section 30 – investigations and proceedings

1.1, 1.5, 1.6, 2.4, 3.1 and 3.3

30. The council applied section 30 to the points of the request listed above, explaining to the Commissioner in its correspondence of 3 January 2019 that it believed that section 30(1)(a)(i) and (ii), 30(1)(b), 30(2)(a)(i) and 30(2)(b) applied.
31. Firstly, the Commissioner will consider the council's application of section 30(1) and, only if she finds that it is not engaged, does she intend to consider the council's application of section 30(2).
32. Section 30(1) states that Information held by a public authority is exempt information if –
“it has at any time been held by the authority for the purpose of –
(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained – (i) whether a

person should be charged with an offence, or (ii) whether a person charged with an offence is guilty of it,

(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 the power to conduct..."

33. In order to claim section 30(1)(b) a public authority only needs to have the power to conduct those investigations rather than a duty and must also have the power to institute and conduct any criminal proceedings that result from its investigation. It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence. However, the purpose of the investigation must be to establish whether there are grounds for charging someone, or if they have been charged, to gather sufficient evidence for a court to determine their guilt. Information which has been held at any time for the purpose of these investigations and proceedings will be exempt. The Commissioner considers that the phrase 'at any time' means that information can be exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation.
34. Section 30 is class-based so it is not necessary for the council to demonstrate that disclosure would prejudice any particular interest in order to engage it.
35. The council explained that the reports following audit referrals and standards investigations referred to in the request were complete at the time of the request. The reports were commissioned with the aim of determining if matters should be referred to the standards committee for a local hearing in relation to member misconduct matters. Following the conclusion of such an investigation, matters could have been referred to the police and ultimately could have led to prosecution. The Commissioner is informed that the council is able to carry out investigations under the Localism Act 2011 and to prosecute under section 222 of the Local Government Act 1972.
36. The Commissioner has considered the information withheld by the council in relation to 1.1, 1.5, 1.6, 2.4, 3.1 and 3.3 and she is satisfied that section 30(1)(a)(i) and (ii) and section 30(1)(b) are applicable.

Public interest test

37. Section 30(1) is a qualified exemption and therefore, having established that it is applicable, the Commissioner must then

consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing it.

Public interest in maintaining the exemption

38. The council contended that the publishing of such a report/s could be damaging to the reputation of the central individual both in terms of reputation and career when ultimately there were no findings against that individual. The withheld information is considered to be confidential by the council and it provided no arguments in favour of disclosing the information.
39. The council further argued that evidence which was gathered remains confidential as it includes witness and third party personal data. To release such information could further damage the public authority's investigations and the willingness of individuals to cooperate with them. The information includes witness evidence and third party personal data.

Public interest in disclosing the information

40. The complainant has stated that the investigation was completed some time before he made the request and the Commissioner has considered whether the argument for maintaining the exemption in such circumstances is persuasive, given that the investigation is now closed.

The balance of the public interest

41. The Commissioner has taken account of the public interest in promoting openness and transparency when public authorities are carrying out investigations into officials elected by the public. Disclosure of the requested information may enable the public to understand the conclusions reached in an investigation and how they were arrived at.
42. The council considered it to be in the public interest to confirm that it did hold the requested information. However, it also considered that this information should not be disclosed. The fact that some information concerning the matters that were investigated may exist in the media does not mean that the withheld information should be released.
43. The Commissioner has taken account of the arguments on both sides regarding release of this information. As no wrong-doing was ultimately found there is less public interest in release of the information. On the other hand, the less significant the information, the less likelihood of harm there would be in releasing it.

44. When the Commissioner is assessing the balance of the public interest as it relates to this exemption, she takes the view that consideration should only be given to protecting the effective investigation and prosecution of crime and to do so means ensuring that people are not deterred from making statements or reports for fear they might be publicised. It is clearly in the public interest to safeguard the investigatory process. The Commissioner cannot see any compelling reason why it is in the public interest to disclose this information and undermine the investigatory process. In all the circumstances of this case the Commissioner is of the view that 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.

Section 41 – information provided in confidence

45. The council applied section 41 – information provided in confidence to 2.2 and 2.4 of the request. As the Commissioner has concluded that the exemption at section 40(2) applies to 2.2 and the exemption at section 30 applies to 2.4 and that they were correctly withheld under those exemptions, she does not propose to consider section 41.

Section 42 – legal professional privilege

1.3, 1.4 and part of 1.7

46. Section 42(1) of the FOIA states that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and that this claim to privilege could be maintained in legal proceedings.
47. The confidentiality of communications between a client and their lawyer is protected by LPP and it is a fundamental principle that is rarely overturned. There are two categories of legal professional privilege – litigation privilege and legal advice privilege. Legal advice privilege concerns the confidential communications that pass between client and lawyer for the dominant purpose of seeking or giving legal advice. The legal adviser must be providing advice in a legal context about legal rights, liabilities, obligations or remedies. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
48. The council explained to the Commissioner that specific legal advice had been sought from legal counsel regarding the investigation.

Legal action was threatened and the council took advice and for that reason it claims litigation privilege for the information it has withheld.

49. The complainant however argued that there had been a blurring of the lines at the council and that solicitors did not always act as lawyers when undertaking specific tasks but sometimes acted politically.
50. The Commissioner has been provided with the withheld information which partly consists of advice from legal Counsel that was provided to the legal Manager at the council regarding the investigation.
51. Having seen the withheld information, the Commissioner is satisfied that it relates to the conduct of the investigation the council conducted, the fact that it is advice is also specifically referred to in the correspondence. The council has confirmed that it remains privileged. It is therefore legal advice and engages section 42(1).
52. The Commissioner does not agree with the council in its application of LPP to some of the requested information. The information withheld at 1.4 does not fall under LPP because it is not advice provided to the council but correspondence to the council from a solicitor acting on behalf of a client. It therefore does not engage this exemption. However, the Commissioner considers that this part of the withheld information would fall under section 30 and section 40(2) and is exempt for the reasons given under those headings earlier in this decision notice.

Public interest test

53. As section 42 is a qualified exemption, the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information in all the circumstances of the case.

Public interest arguments in favour of disclosing the information

54. The council has not provided any public interest arguments in favour of disclosing this information.

Public interest arguments in favour of maintaining the exemption

55. The council is convinced that the arguments in favour of non-disclosure are compelling. It argues that the matter was fully dealt with and investigated and the councillor concerned was exonerated. The council's view is that there is no public interest in releasing this information when set against the potential damage to the

reputation of the councillor concerned and the various third parties whose public and private life could be damaged.

The balance of the public interest

56. The Commissioner recognises that disclosure would improve the transparency of the decision-making process by disclosing the content of the advice which would shed light on the conduct of the investigation and the decisions that had been made.

57. The public interest in maintaining the exemption carries such a strong, in-built weight that there would have to be compelling public interest reasons for releasing information to countermand it. The Commissioner notes the decision in *Council v Information Commissioner and Gavin Aitchison (GIA 4281 2012)* where, at paragraph 58, Upper Tribunal Judge Williams said:

"...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".

58. The Commissioner does not accept that there is any such compelling reason here. Any argument for disclosure is weak given the nature of the withheld information which includes matters of a private nature which resulted ultimately in no action. The principle of LPP cannot be overturned solely to allow transparency to the public and the Commissioner considers that the exemption was applied correctly to the information requested at 1.3 and 1.7.

Section 12 – cost of compliance exceeds fees limit

Part of 1.7

59. Section 12(1) of the FOIA states that:

'(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'

60. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit

of 18 hours in respect of the council. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

61. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.¹
62. The complainant suggested that the idea of applying costs was disingenuous as he had only requested the relevant documents.
63. The council explained in its arguments to the Commissioner on 3 January 2019 that a search was made at the time of the request for the requested documents. There were no hard copies to search, only electronic documents. The employee in question no longer works for the council and consequently the email account is not active or retrievable. Had it been possible to retrieve the account, it would have been necessary to conduct a manual search for each entry within the period of the investigation approximately a six month period in 2016 until the point at which the named employee left. The Commissioner notes that the employee had left the council before the date of the request.
64. The council explained that the named employee sent and received over 100 emails a day. The council estimates that to check each one would take one minute and over the period of time that the investigation lasted this would take over 33 hours to review. The council believes that the matters being investigated could have been discussed with a number of individuals which meant that narrowing the search was not possible. Additionally it is possible

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> (paragraph 12)

that electronic notes were made under different names and formats which would take additional time to locate.

65. The Commissioner is concerned by the council's response regarding its application of section 12. Firstly, if the council was convinced that section 12 applied to this part of the request, it could have refused the whole request on the basis that this one part exceeded the fees limit. Possibly the council wished to be helpful by answering what it could from the request. It is unclear in its initial response to the complainant whether the council had actually conducted a search when it applied section 12. It did not offer any advice and assistance as to how the complainant could have refined this part of the request in order that the council could conduct a search that would meet the fees limit, whether or not any or all of the information returned would have been disclosed. At review stage the reviewer addressed only the part of 1.7 involving the application of legal professional privilege.
66. Due to the passage of time the matter is now academic. The Commissioner makes the assumption that the emails of a senior member of staff would be archived after they leave for a period of time and would be potentially retrievable. The council maintains that the email account is no longer retrievable. Whilst the Commissioner accepts this, she does not accept that the council carried out its duties in respect of 1.7 and that the delay between the initial response and the review made any meaningful attempt to conduct a search futile.

Section 16: Duty to provide advice and assistance

67. Section 16 of the Act states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

68. The Commissioner's guidance on section 12 of the Act states the following -

"In cases where it is reasonable to provide advice and assistance in The particular circumstances of the case, the minimum a public Authority should do in order to satisfy section 16 is:

- *either indicate if it is not able to provide any information at all within the appropriate limit; or*
- *provide an indication of what information could be provided within the appropriate limit; and*
- *provide advice and assistance to enable the requestor to make a refined request.”²*

69. The complainant cast his net wide in the second part of his request at 1.7. Nonetheless, the Commissioner would have expected the council to try and direct the complainant in providing a more focussed request when it applied section 12 to this part of the request.

Section 10 – time for compliance with request

70. Section 10(1) of the FOIA states that:

“...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt”.

71. The Commissioner finds that the council breached the requirement of the Act, that an information request should be responded to within twenty working days of receipt.

72. The council also disclosed further information to the complainant under 1.2, 1.7 and 2.1 more than a year after the initial request.

Other matters

73. Additionally there was a delay in completing the internal review which went so far beyond the maximum 40 working days recommended that the Commissioner considers it unacceptable.

74. The Commissioner is aware that the council has had historic issues regarding its responses to information requests that it is now working to address.

² https://ico.org.uk/media/fororganisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf (paragraph 59).

Right of appeal

75. 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

76. 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.
77. 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

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