

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 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) relating to named councillors use of the internal audit department and correspondence/communications between those named councillors and council staff, including the Chief Executive, concerning audit investigations. He also requested the information relating to house deals regarding one named councillor and house and land deals relating to another named councillor. The council belatedly provided some links to information in the public domain but withheld the remainder of the information under section 30(1) and (2), section 41(1) and section 40(2).
2. The Commissioner's decision is that the council has correctly withheld the information under section 30(1)(b) and section 40(2). She also considers that no further information is held in relation to part one of the request on the balance of probability. However, the council breached section 10(1) by failing to provide links to its website within 20 working days.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 21 September 2017 the complainant wrote to the council and requested information in three parts which, due to its content, is contained in a confidential annex separate from this decision notice. In order to provide some clarity a summary of the request is as follows:
 1. All documents (correspondence and communications) relating to certain named councillors use of the internal audit department to make audit investigation enquiries up to the date of the request. Specifically all records of communication between these councillors and council staff, particularly the Chief Executive, relating to these investigations.
 2. All documents relating to specific investigations about a named councillor.
 3. All unredacted documents relating to specific investigations about a named councillor.
5. The council responded on 10 October 2017 and denied holding some of the requested information (part one of the request). Apart from stating that there was some information in the public domain regarding both parts two and three of the request in the form of an audit investigation, the council refused to provide other information it held in relation to ongoing investigations. The council argued that investigations could be prejudiced if the information was disclosed.
6. The complainant asked for a review on 13 December 2017. The council did not provide an internal review until 27 June 2018 in which it provided links to the complainant regarding what was publicly available in the form of documents relating to land sales, and a council update on allegations of fraud and misconduct. The council explained that information in relation to part one of the request was 'not held', apart from one meeting that had been identified between a named councillor where information was supplied to a council officer. The council then applied section 41 (information supplied in confidence) to this information and section 30 (investigations and proceedings).
7. On 23 November 2018 the council responded to the Commissioner's correspondence and also applied section 40(2) (personal information) to the withheld information under parts two and three.
8. The Commissioner has had sight of the withheld information which consists of the unredacted background supporting evidence in relation to standards allegations and the investigations that followed. This information has not been published but there is information, some of which has been redacted, which was provided to the complainant at

review via links. The Commissioner has also been provided with a link to a report that has been published on the council website, though it post-dates the request.

Scope of the case

9. The complainant contacted the Commissioner on 16 April 2018 to complain about the way his request for information had been handled. He alleged that named councillors were using publicly funded council staff to investigate political opponents and that he believed that there must be information held relating to this.
10. The Commissioner considers that the scope of this case concerns the council's application of sections 30, 40 and 41 to the withheld information. Firstly, she intends to consider whether any other information is held by the council regarding part one of the request.

Reasons for decision

Section 1 – general right of access

11. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
12. The complainant has stated that it is inconceivable that the council does not hold any information in relation to part one of his request other than one record of a meeting. He urged the Commissioner to make the council deal with each of his allegations in line with the FOIA. In his review request, the complainant underpinned his argument that further documentation must be held by providing the council with various quotes which were dated that he stated were from two named councillors about their use of the audit department. After the review, the complainant again expressed the view that the councillors that had allegedly used the audit department could not expect confidentiality and he cited the contents of a WhatsApp feed to support his view that information was held.
13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

14. On 24 October 2018 the Commissioner asked the council to assist in her determination regarding part one of the request by responding to detailed questions concerning what searches had been made to determine whether it held information falling within scope.
15. The council responded on 23 November 2018 refuting the idea that investigations had been instigated by elected members of the council in order to discredit other elected members. The council argued that it had no need to search for such information because it did not exist. It did state, however, that it had made reasonable searches of the council's electronic email system for correspondence between the named parties regarding the matters raised by the complainant. No communications were identified.
16. The Commissioner went back to the council to ask for more detail than had been provided about the searches that it had carried out. On 22 February 2019 the public authority responded again to the Commissioner and explained that a search had been conducted of the council's email accounts for all emails sent 'to' and 'from' the named councillors. The council also asked individual officers, all Directors, the audit team, the Monitoring Officer and the Chief Executive, if they held electronic or written records.
17. The council has suggested that the information relating to part one of the request never existed in the first place, though its position was somewhat undermined at review by the admission that one item was held. However, even the one item that was 'held' by the council relating to part one of the request can now no longer be clearly identified due to staff changes and the passage of time. The council has only been able to locate a handwritten document that is unclear as to what it relates to, other than it appears to be a record from the audit team investigations. The council has reiterated several times that there is no further information held. The Commissioner accepts that this is the case, based on the balance of probability.

Section 30 – investigations and proceedings

18. The council applied section 30 to the unredacted reports and the supporting evidence in both investigations which includes witness evidence, explaining to the Commissioner in its correspondence of 3 January 2019 that it considered that section 30(1)(a)(i) and (ii), 30(1)(b), 30(2)(a)(i) and 30(2)(b) applied.
19. Firstly, the Commissioner will look at the council's application of section 30(1).
20. 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..."*

21. 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.
22. 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.
23. The withheld information consists of audit referrals and standards investigations into the councillors named in the request. However, there is some information in the public domain that has been provided to the complainant at review in the form of links. Subsequently a report was published on the council's website concerning one of the named councillors.
24. The Commissioner asked the council to explain in more detail exactly what legislation it was relying on in order to cite section 30. The council responded on 4 January 2019 stating that it has the power to carry out investigations under the Localism Act 2011, paragraphs 27, 28, 34 and schedule 1 and 4 and to bring criminal proceedings under the Local Government Act 1972, specifically section 222.
25. The Commissioner is satisfied that the council has the power to conduct these investigations and that the information withheld by the council falls under section 30(1)(b) and is exempt from disclosure on that basis.

For that reason she has not gone on to consider any further application of section 30 by the council.

Public interest test

26. Having established that section 30 is applicable, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing it.

Public interest in maintaining the exemption

27. The council's view is that it is imperative that evidence which has been gathered remains confidential. Releasing this information could damage future investigations if it affected an individual's willingness to cooperate. The council further argued that it has to have the ability to comply with its duty to detect the wrongdoing of members and that disclosure would place this process in jeopardy.

Public interest in disclosing the information

28. The complainant contended that he was unable to find any information on the council's website about the standards allegations and the investigations that followed as had been indicated in its initial response.

The balance of the public interest

29. The Commissioner has taken account of the public interest in promoting openness, transparency and high standards when public authorities are carrying out investigations into publicly elected officials. Disclosure of the requested information may enable the public to understand the conclusions reached in an investigation and how those conclusions were arrived at.
30. The council has placed in the public domain information that discloses details about these audit investigations. However, the Commissioner agrees with the complainant that this information is very difficult to locate.
31. Nevertheless, the Commissioner accepts the council's view that the potential damage that would be caused to an individual's reputation where no fault had been found, outweighs the public interest in the disclosure of the withheld information. This is particularly the case when information has been placed in the public domain by the council on its website consisting of an update on allegations of fraud and misconduct and background documentation. The publication of these documents enabled the council to take account of data protection considerations and only publish details that would not jeopardise future investigations.

32. Subsequently, a report concerning one of the councillors where breaches of the member code of conduct were identified has been published on the council's website which the council considers is in the public interest and satisfies transparency. The Commissioner has only looked at the situation at the time of the request which was for the full investigation and report which the council considers confidential.
33. The Commissioner takes the view that consideration should 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 during investigations. Information has been published regarding the standards investigations in a way that enables the council to satisfy its duty to be open whilst safeguarding the investigatory process. The Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the information and that the council was entitled to withhold the requested information.

Section 40(2) – Personal information

34. 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.
35. The complainant has asked for information that contains third party personal data, namely the members under investigation, all of the witnesses and other third parties involved in the investigations.
36. The Commissioner has reviewed the withheld information and it consists of the unredacted information relating to two investigations. Within this information is the personal data of third parties. The Commissioner considers that the information contains biographical detail and information about alleged incidents involving clearly identified individuals. The withheld information is clearly personal data. The Commissioner is not able to provide any further details.

Does the information contain any sensitive personal data?

37. 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.
38. 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?

39. 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.

40. 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."*

41. 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

42. The council argued that much of the information detailed in the evidence relating to the reports is personal data, some of it sensitive. It relates to both the individual's public and private lives. It is the council's view that none of the individuals could have envisaged that this particular information would be shared. The consent of the individuals concerned was not provided to release this information and it would be extremely distressing for the individuals concerned to have such information released.

Consequences of disclosure

43. The Commissioner agrees that the consequences for the third parties concerned could be severe. One of the investigations was discontinued and this decision was communicated to the councillor concerned via the normal council process in line with the Localism Act 2011. The Commissioner considers that his expectations would be that the entire investigation would not then be placed in the public domain in an unredacted form. Witnesses providing evidence have not given consent to release and the council argues would not have had any reasonable expectation that the information would be published.

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

44. The Commissioner accepts that the release of the unredacted personal information relating to the standards investigations would be outside the reasonable expectations of the data subjects concerned. The Commissioner has been provided with evidence from the council that supports the view that the release of interview statements would be unfair and cause distress, particularly regarding certain third parties who wished to remain anonymous, and therefore would be in breach of the first data protection principle.
45. 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 41 – information provided in confidence

46. The council also applied section 41 to the witness evidence contained in the evidence packs. However, as the Commissioner has concluded that the exemptions at section 40(2) and the exemption at section 30 applies to this information and that they were correctly withheld under those exemptions, she does not propose to consider the application of section 41.

Section 10 – time for compliance

47. Section 10(1) of the FOI Act says that:

"Subject to subsections (2) and (3), 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."

48. The links to what the council stated was information already in the public domain were only provided at review. The Commissioner considers that the council should have provided a precise link or some other direct reference to help locate the information. In not doing so it exceeded the statutory timeframe and breached section 10 of the FOIA.

Other matters

49. 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.

Right of appeal

50. 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

51. 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.
52. 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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