

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2022

Public Authority: South Lakeland District Council
Address: South Lakeland House
Lowther Street
Kendal
Cumbria
LA9 4DQ

Decision (including any steps ordered)

1. The complainant has requested information about enforcement action taken by South Lakeland District Council ('the Council') in respect of a breach of planning that he had reported. The Council refused the request on the grounds that the information was exempt from disclosure under sections 36 (Prejudice to effective conduct of public affairs), 40 (Personal information) and 41 (Information provided in confidence) of FOIA.
2. The Commissioner's decision is that some of the information was the complainant's own personal data and was exempt from disclosure under section 40(1) of FOIA. The Council was entitled to rely on sections 36(2)(b)(i) and (ii) to refuse the remaining parts of the request. However, by failing to respond to the request within 20 working days, the Council breached sections 1, 10 and 17 of FOIA.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 4 April 2022, the complainant wrote to the Council and requested information in the following terms:

"All correspondence regarding the enforcement action taken against [business name redacted] of [address redacted] for breach of

planning permission, notification of which you have received, resulting from change of use of the property from a hairdressers to a hot food takeaway. I wish to see all letters, e mails and file notes.”

5. The Council responded on 19 May 2022. It confirmed that the breach had been investigated and the business owner had been asked to submit a retrospective planning application for change of use, which they had done. It invited the complainant to view the application documents, which were published on its website. It refused his specific request for the communications it held on the matter, saying that they were exempt from disclosure under sections 36(2)(b)(i) and (ii), 40(2) and 41 of FOIA. It maintained this position at internal review.

Reasons for decision

6. The Council has told the Commissioner that, following a final decision on the retrospective planning application (which took place after the request was received and responded to), further documents likely to be of interest have recently been published on its website¹.
7. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA as things stood at the time of the request.
8. At the time of the request, the withheld information comprised:
 - (a) A covering email sent by the complainant
 - (b) A planning enforcement complaint form sent by the complainant
 - (c) A short report of the apparent planning breach, compiled by the Council
 - (d) Correspondence to, and from, the planning applicant, regarding the matter.

¹<https://applications.southlakeland.gov.uk/fastweb/detail.asp?AltRef=SL/2022/0447&ApplicationNumber=SL%2F2022%2F0447&AddressPrefix=&Postcode=&Submit=Search>

Section 40 – personal information

9. Under section 40(1) of FOIA, information is exempt information if it is the personal data of the applicant. This is because disclosure under FOIA is disclosure to the wider world. Individuals may instead request their own personal data under data protection legislation.
10. The Commissioner understands that the matters referred to in the request concern a complaint the complainant had submitted to the Council regarding the change of use of a building.
11. Having viewed the withheld information, the Commissioner is satisfied that item (a) and parts of item (b) are the complainant's own personal data. He is satisfied that the Council was entitled to withhold the complainant's personal data under section 40(1) of FOIA.

Section 36 – Prejudice to effective conduct of public affairs

12. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
13. The Commissioner has considered the application of section 36 to items (c) and (d), and, to the extent that it contains information which is not the complainant's personal data, to item (b).
14. The Council has applied sections 36(2)(b)(i) and (ii) to withhold the requested information. Arguments under these sections are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
15. The Commissioner's guidance on section 36² states that information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation.

² <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

16. These exemptions are concerned with the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.
17. In this case, the Council is concerned about the chilling effect of disclosing communications which detail how it was dealing with a planning breach, on council staff and on those with whom they consult regarding such matters. The Council is concerned this would be likely to lead to poorer decision-making, which would weaken the planning system.
18. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that the Council's Monitoring Officer is authorised as the qualified person under section 36(5) of FOIA and that he gave the opinion that the exemption was engaged. The Commissioner accepts that it was reasonable for the qualified person to consider that there was a need to protect the confidentiality of discussions and deliberations, both within the Council, and with external people (complainants and planning applicants) about specific planning matters. He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. He is therefore satisfied that the exemption was engaged correctly.
19. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the withheld information at the time of the request (only a few weeks old) and that the matter it pertained to had yet to be determined. Clearly, the Council needs a safe space to consider how to deal with breaches of planning law, out of sight of anyone who might attempt to interfere with, or influence, the process. Its officers also need to be able to express their views on possible options and to offer advice and recommendations, frankly and freely. If they become concerned that these discussions might be made public, the resultant loss of frankness and candour in the course of discussions and deliberations would be likely to damage the quality of advice to decision makers, and thus inhibit the Council's ability to make fully informed decisions on matters of planning compliance.
20. It is also reasonable to believe that people might be deterred from making complaints about such matters if they are concerned that their complaints, and particularly anything which reveals their identity, may be disclosed to the world at large. On that point, the Council said that its complaints policy gives assurances that complaints will not be discussed

with anyone who is not involved in the process. Similarly, planning applicants may be more guarded in their interactions with the Council if they are concerned that their discussions are not confidential.

21. These points carry particular weight when, as in this case, the legal matters under consideration are still live at the time of the request.
22. It is clearly not in the public interest to deter public engagement with the planning process, and doing so may result in planning decisions which are less fair, robust and effective.
23. The Commissioner considers the public interest in protecting good decision-making by the Council, and public engagement with the planning process, to be compelling arguments in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in protecting the Council's access to unfiltered, frank advice and information on a live planning matter, to be the stronger argument.
24. Consequently, he is satisfied that, at the time of the request, the public interest favoured maintaining the exemption. His decision is therefore that the Council was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse to disclose items (b), (c) and (d).
25. In light of this decision, he has not gone on to consider the Council's application of sections 40(2) and 41 of FOIA.

Procedural matters

26. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. Where a public authority considers the information is exempt from disclosure, section 17 of FOIA requires it to issue a refusal notice, explaining why.
27. Section 10(1) of FOIA requires these actions to be taken within 20 working days of receipt of the request.
28. In this case, the Council took 30 working days to respond to the request. It therefore breached sections 1(1)(a), 10 and 17 of FOIA.
29. The Council has apologised to the complainant for the delay in responding to his request.
30. The Commissioner has made a note of the delay for monitoring purposes.

Right of appeal

31. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF