

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 August 2011

Public Authority: Standards for England
Address: Fourth Floor
Griffin House
40 Lever Street
Manchester
M1 1BB

Summary

The complainant made a freedom of information request to Standards for England (SfE) for a copy of a report concerning the conduct of a named councillor. SfE refused disclosure of the report under section 44 (prohibitions on disclosure) of the Freedom of Information Act 2000 (the "Act"). During the course of the Commissioner's investigation, SfE reconsidered its refusal and agreed to release the report to the complainant subject to a number of redactions. SfE considered that the redacted information was covered variously by the exemptions set out at section 31 (law enforcement), 38 (health and safety), 40 (personal data) and 44. The Commissioner has investigated the complaint and is satisfied that all the redacted information is exempt from disclosure under section 44 of the Act by virtue of the statutory prohibition in section 63 of the Local Government Act 2000. The Commissioner does not therefore require any steps to be taken.

The Commissioner's Role

1. 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 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 22 September 2010 the complainant made the following request to Standards for England (SfE), which was formerly known as the Standards Board for England:

"In August 2008, Barnsley Metropolitan Borough Council Councillor [name] was absolved by the Standards Board for England (SBE) after being referred ...in the public interest...

Since then the (SBE)'s full report into the issue has been withheld from public scrutiny, consequently I hereby request a copy of the full (SBE) report under the Freedom of Information Act."

3. SfE responded to the request on 21 October 2010 by informing the complainant that it considered the requested report to be exempt from disclosure and was being withheld. This was on the basis that the exemption provided by section 44 of the Act (prohibitions on disclosure) applied to the information.
4. On 14 November 2010 the complainant contacted SfE to ask that it carry out an internal review of its decision to withhold the report. In doing so, the complainant stated that the councillor who was the subject of the report had no objections to disclosure.
5. SFE provided the outcome of its internal review to the complainant on 23 November 2010. This upheld the original application of section 44.

The Investigation

Scope of the case

6. On 22 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to withhold the requested information, arguing that:

"Without [the named councillor's] full SBE investigation reaching the public domain suspicion will remain that BMBC [Barnsley Metropolitan Borough Council] is being protected from official criticism and public judgement. Consequently this issue will not be regarded as being concluded!"

7. During the course of the Commissioner's investigation the SfE agreed to the release of elements of the requested report to the complainant. This Decision Notice therefore focuses on the remaining information contained in the report that has been withheld by SfE.

Chronology

8. On 3 February 2011 the Commissioner wrote to the complainant and SfE to acknowledge the complaint.
9. SfE responded to the Commissioner on 4 March 2011 by providing copies of documentation it considered relevant to the case, including a copy of the withheld report. SfE maintained its application of section 44, but also suggested that sections 40(2) (third party personal data) and 31(2)(b) by virtue of section 31(1)(g) (law enforcement) may similarly apply.
10. The Commissioner wrote to SfE on 8 June 2011 to ask it to substantiate its position with respect to the withheld information.
11. In response, SfE agreed to provide a copy of the report to the complainant subject to a number of redactions. This was sent to the complainant on 5 July 2011. In its covering letter to the report SfE advised the complainant that the redacted information was being withheld variously under sections 31, 38 (health and safety), 40 and 44 of the Act.
12. On 8 July 2011 the Commissioner wrote to the complainant indicating his preliminary view that SfE had now complied with the Act by its part-disclosure of the requested information. The complainant responded on 18 July 2011 by reiterating his original view that the full report should be placed in the public domain.

Analysis

Substantive Procedural Matters

13. The full text of the relevant statutory provisions referred to in this section is contained in the legal annex appended to the Decision Notice.
14. As noted at paragraph 11, SfE agreed to the release of parts of the requested report following the involvement of the Commissioner. Regarding the redacted information, SfE altered its original stance that

the information would be covered in its entirety by section 44. Instead, SfE variously claimed sections 31, 38, 40 and 44 as grounds for withholding the information.

15. The Commissioner, however, has found it reasonable to exercise his discretion by considering, in the first instance, whether section 44 applied to all of the redacted information.

Exemptions

Section 44 – Prohibitions

16. Section 44 provides that information is exempt if its disclosure is prohibited under any other law or enactment. In this case the relevant statutory prohibition is section 63 of the Local Government Act 2000 (LGA2000) which states:

63 Restrictions on disclosure of information

(1) Information obtained by ethical standards officers under section 61 or 62 must not be disclosed unless one or more of the following conditions is satisfied—

(a) the disclosure is made for the purposes of enabling the Standards Board for England, an ethical standards officer, the Commission for Local Administration in Wales, a Local Commissioner in Wales or the president, deputy president or any tribunal of either of the Adjudication Panels to perform their functions under this Part,

(b) the person to whom the information relates has consented to its disclosure,

(c) the information has previously been disclosed to the public with lawful authority,

(d) the disclosure is for the purposes of criminal proceedings in any part of the United Kingdom and the information in question was not obtained under section 62(2),

(e) the disclosure is made to the Audit Commission for the purposes of any functions of the Audit Commissioner or an auditor under the Audit Commission Act 1998.

...

(4) A person who discloses information or a document in contravention of subsection (1) is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months, or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

17. For the statutory prohibition to apply the information in question must have been 'obtained' by an ethical standards officer for the purposes of an investigation defined by sections 61 and 62 of the LGA2000. If this condition is satisfied, it is then necessary to consider whether any of the exemptions to non-disclosure set out at section 63(1)(a) – (e) apply.
18. When considering the question of whether information was 'obtained', the Commissioner would stress that, to paraphrase his comments at paragraph 20 of his decision involving the Financial Services Authority (FS50377785)¹, the focus here is on the information contained in the report. While the report may not have been physically obtained by the SfE, insofar as it was generated by the SfE itself, the Commissioner will need to consider whether the information that makes up the report was obtained by the SfE.
19. The report itself extensively refers to, and is heavily reliant on, evidence made available to the Ethical Standards Officer as part of her investigation. This took account of the evidence obtained from the central figures related to the allegation, as well as documentary evidence received from the Council's Monitoring Officer.
20. The Commissioner is satisfied that, for the most part, the contents of the redacted information is clearly information that has been obtained by the Ethical Standards Officer in order to carry out an investigation under sections 61 and 62 of the LGA2000.
21. However, the Commissioner has observed that for some of the redacted information this issue of whether the information has been obtained is less clear cut. This is because the redacted information focuses more on the SfE's own conclusions or deductions based on the evidence it obtained during the course of its investigation.
22. While acknowledging the ambiguity that may arise from the use of the term 'obtained', the Commissioner has adopted the approach taken in

¹ http://www.ico.gov.uk/~/_/media/documents/decisionnotices/2011/fs_50377785.ashx

FS503877785 by finding that the less clear cut information is genuinely 'embedded' with information that has been obtained:

"In the Commissioner's view it would not be possible to disclose this information without also disclosing information that has been received by the public through its investigation or else attempting to extract the information that had not been received from the information would render the information meaningless when taken out of the wider context." (paragraph 26)

23. Following this line of reasoning, the Commissioner accepts that the redacted information was obtained by SfE and therefore subject to the restrictions on disclosure provided by section 63 of the LGA2000. The Commissioner has therefore gone on to consider whether the redacted information is covered by any of the exemptions to non-disclosure contained within that section.
24. The Commissioner has found that, of these exemptions, only two would potentially apply for the purposes of a disclosure under the Act. These are:

(b) the person to whom the information relates has consented to its disclosure,

(c) the information has previously been disclosed to the public with lawful authority.

25. With regards to section 63(1)(b), the complainant has argued that the councillor who was the subject of an allegation has "no objection to the full investigation report reaching the public domain." The Commissioner, however, has not seen any evidence to this effect, particularly that the councillor has given express consent to the disclosure of information under the Act and therefore to the world at large. The Commissioner similarly recognises that SfE would not be under an obligation to seek the consent of the councillor, as demonstrated in a previous decision of the Commissioner which also involved SfE (FS50353325)².
26. In any case the Commissioner accepts as reasonable the SfE's argument which it provided to the complainant as part of its internal review:

"The difficulty is that much of the report refers to the interactions between [the named councillor] and others so they too would have to

² http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50353325.ashx

consent to those details being made public before I could release the full report. Given the efforts that went into maintaining the anonymity of the employee witnesses in this case and in the absence of any legal requirement to do so I do not consider it a good use of public resources to ask them all again if they still wish to have their anonymity preserved.

27. In the absence of evidence that demonstrates consent to disclosure by the persons to whom the information relates the Commissioner has determined that the exemption provided by section 63(1)(b) is not engaged. He has therefore considered the possibility that section 63(1)(c) may apply in the alternative.
28. The Commissioner would firstly point out that, at the conclusion of its investigation, SfE released a case summary of its findings which would have been published on its website for a time and has been supplied to the complainant. This set out the material facts of the case and SfE's determination based on those facts. This disclosure, the Commissioner accepts, was made in accordance with the exemption contained at section 63(1)(a) of the LGA2000. This allows SfE to disclose information for the purpose of carrying out its functions under Part III of the LGA2000, an exemption which as previously noted would not apply in this situation.
29. SfE has also acknowledged that, because of the circumstances that led to an allegation being referred for it to investigate, the public will have knowledge of certain aspects of the case:

"We are aware that some of the information in the Ethical Standards Officer's (ESO) report is already in the public domain. The original Barnsley council internal investigation and report and further report arose from a whistle blowing complaint, and the internal investigation resulted in that report containing certain sensitive information. The names of employees (and external contractors' employees) have been protected throughout. However the Council's Cabinet considered the internal reports in public on 30 May 2007 so that the press and public could have been present when the matter was considered. The matter of the expenditure had also been considered and approved at a full council meeting again in public on 28 July 2005.

We have noted that the report was sent to Barnsley Council's standards committee for its consideration, but we have not been able to identify whether that consideration was open to the public or press.

30. Bearing this in mind, the Commissioner accepts that information pertinent to the investigation of the SfE will have been disclosed to the

public with lawful authority, namely by the Council and SfE. While SfE has not been able to identify categorically what information was previously made available by the Council, and even then in a limited forum, it has taken steps to release parts of the report to the complainant. This included significant details of the allegation itself, parts of the background to the allegation, and the majority of the reasoning of the Ethical Standards Officer and her finding. This disclosure, in the main, echoed those facts contained in the case summary associated with the investigation.

31. The redacted information, on the other hand, predominantly relates to statements given by those individuals connected to the case; information that distinctly relates to the SfE's investigation. SfE has also sought to protect specific details, such as personal data, that it considers would not have been placed in the public domain.
32. The Commissioner therefore considers it reasonable to conclude that the redacted information would not have previously been disclosed to the public with lawful authority. Consequently, he has decided that the redacted information is not subject to section 63(1)(c) and, in turn, the statutory prohibition set out by the LGA2000 would apply.
33. The Commissioner is aware of the importance that the complainant has placed on the full disclosure of the report; disclosure that the complainant considers would vindicate the councillor that features as the focus of the allegation. However, where a statutory prohibition is found to apply the Commissioner must necessarily conclude that the information is exempt by virtue of section 44 of the Act. Furthermore, as section 44 is an absolute exemption, there is no requirement for the Commissioner to consider whether, and if so to what extent, there was a public interest in the release of that information.

Other exemptions

34. The Commissioner has decided that the redacted information is exempt information under section 44 of the Act. He has not therefore gone on to consider the other exemptions cited by the SfE.

The Decision

35. The Commissioner's decision is that the redacted information contained in the report was subject to the exemption provided by section 44 of the Act.

Steps Required

36. The Commissioner requires no steps to be taken.

Right of Appeal

37. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 31st day of August 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Prohibitions on disclosure

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Local Government Act 2000

Procedure in respect of investigations

Section 61 provides that –

“(1)The procedure for conducting an investigation under section 59 is to be such as the ethical standards officer considers appropriate in the circumstances of the case.

(2)Without prejudice to subsection (1), the ethical standards officer must give any person who is the subject of an investigation under section 59 an opportunity to comment on any allegation that he has failed, or may have failed, to comply with the relevant authority concerned’s code of conduct.

(3)An ethical standards officer may, if he thinks fit, pay to persons who attend or furnish information for the purposes of an investigation under section 59—

- (a) such sums in respect of the expenses properly incurred by them, and
- (b) such allowances by way of compensation for the loss of their time,

as may be determined by the Secretary of State.

(4)The carrying out of an investigation under section 59 is not to affect—

- (a) any action taken by the relevant authority concerned, or
- (b) any power or duty of the relevant authority concerned to take further action with respect to any matters which are the subject of the investigation.

(5) Where a person is no longer a member or co-opted member of the relevant authority concerned but is a member or co-opted member of another relevant authority in England, any reference in subsection (4) to the relevant authority concerned is to be treated as including a reference to that other relevant authority."

Investigations: further provisions

Section 62 provides –

"(1) An ethical standards officer, or a person authorised by such an officer, has a right of access at all reasonable times to every document relating to a relevant authority which appears to him necessary for the purpose of conducting an investigation under section 59 in relation to a member or co-opted member (or former member or co-opted member) of the authority.

(2) An ethical standards officer, or a person authorised by such an officer, may—

- (a) make such inquiries of any person as he thinks necessary for the purpose of conducting such an investigation,

- (b) require any person to give him such information or explanation as he thinks necessary for the purpose of conducting such an investigation, and

- (c) if he thinks necessary, require any person to attend before him in person for the purpose of making inquiries of that person or requiring that person to give any information or explanation.

(3) Without prejudice to subsections (1) and (2), a relevant authority must provide an ethical standards officer, or a person authorised by such an officer, with every facility and all information which he may reasonably require for the purposes of conducting an investigation under section 59 in relation to a member or co-opted member (or former member or co-opted member) of the authority.

(4) An ethical standards officer, or a person authorised by such an officer, may under this section require any person—

(a) to furnish information concerning communications between the authority concerned and any Government department, or

(b) to produce any correspondence or other documents forming part of any such communications.

(5) No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to persons in Her Majesty's service, whether imposed by any enactment or by any rule of law, is to apply to the disclosure of information in accordance with subsection (4).

(6) Where subsection (4) applies, the Crown is not to be entitled to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.

(7) Nothing in this section affects—

(a) the restriction, imposed by section 11(2) of the Parliamentary Commissioner Act 1967, on the disclosure of information by the Parliamentary Commissioner or his officers,

(b) the restriction, imposed by section 32(2) of the Local Government Act 1974, on the disclosure of information by any members or officers of the Commission for Local Administration in England or the Commission for Local Administration in Wales, or

(c) the restriction, imposed by section 15 of the Health Service Commissioners Act 1993, on the disclosure of information by the Health Service Commissioner for England or the Health Service Commissioner for Wales, or by their officers.

(8) To assist him in any investigation under section 59, an ethical standards officer may obtain advice from any person who in his opinion is qualified to give it and may pay to any such person such fees or allowances as he may determine with the approval of the Secretary of State.

(9) Subject to subsections (5) and (6), no person may be compelled for the purposes of an investigation under section 59 to give any evidence or produce any document which he could not be compelled to give or produce in civil proceedings before the High Court.

(10) A person who without reasonable excuse fails to comply with any requirement under subsection (2) or (4) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(11) In this section any reference to documents includes a reference to information held by means of a computer or in any other electronic form.”

Restrictions on disclosure of information

Section 63 provides –

“(1) Information obtained by ethical standards officers under section 61 or 62 must not be disclosed unless one or more of the following conditions is satisfied—

(a) the disclosure is made for the purposes of enabling the Standards Board for England, an ethical standards officer, the Commission for Local Administration in Wales, a Local Commissioner in Wales or the president, deputy president or any tribunal of either of the Adjudication Panels to perform their functions under this Part,

(b) the person to whom the information relates has consented to its disclosure,

(c) the information has previously been disclosed to the public with lawful authority,

(d) the disclosure is for the purposes of criminal proceedings in any part of the United Kingdom and the information in question was not obtained under section 62(2),

(e) the disclosure is made to the Audit Commission for the purposes of any functions of the Audit Commissioner or an auditor under the Audit Commission Act 1998.

...

(4) A person who discloses information or a document in contravention of subsection (1) is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months, or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.”