

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 February 2010

Public Authority: Commission for Local Administration in England
(Local Government Ombudsman)

Address: Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant requested information from the Local Government Ombudsman (the "LGO") about a complaint involving Stevenage Borough Council. The public authority claimed that section 32(2) of the Local Government Act 1974 applied to this information. It therefore considered that it was under no duty to disclose the information courtesy of section 44 of the Freedom of Information Act 2000 (the "Act") and regulation 12(5)(d) of the Environmental Information Regulations 2004 (EIR). During the course of the Commissioner's investigation, the LGO has agreed to the release of one document. However, the Commissioner is satisfied that the remaining withheld information is exempt under section 44 of the Act. Nevertheless, he does find the LGO breached section 17(1) in its handling of the request.

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 26 November 2008, the complainant wrote to the Local Government Ombudsman (LGO) to request the following:

"Regarding Previous Complaint against Stevenage Borough Council which was handled by [a specified LGO employee]"

...I request all details of the above mentioned complaint and investigation against Stevenage Borough Council. I request details of all correspondence exchanged in particular between Stevenage Borough Council and the Local Government Ombudsman. I understand all personal information will be redacted in the usual way."

3. The LGO responded to the request on 13 January 2009, initially apologising for the delay in coming back to him. The LGO commented that the complainant did not specify the complaint about which he was interested but had taken this to be:

"...any other complaint about the matters about which [the complainant had made his] own complaint. Although I understand I do not have to confirm or deny whether there is such a complaint, it is clear that you are aware that there has been a previous complaint in similar terms. That complaint is closed."

4. In processing the request, the LGO informed the complainant that it had considered the request under both the Act and the Environmental Information Regulations 2004 (EIR) but had found that the requested information should be withheld in either case. Turning to the Act, the authority claimed that section 44 would apply to the requested information, which provides an exemption to disclosure where it is prohibited under any other law. The LGO stated that the relevant statutory prohibition was section 32(2) of the Local Government Act 1974 (LGA).
5. In relation to information falling under the EIR, the authority concluded that regulation 12(5)(d) was engaged. This contains an exception to disclosure where the release of information would adversely affect the confidentiality of the proceedings of that or any public authority where such confidentiality is provided by law. As required by regulation 12(1)(b) of the EIR, the LGO weighed the public interest in disclosure against that in maintaining the exemption, but found that it favoured maintaining the exception.
6. The complainant subsequently asked the LGO to carry out an internal review of its decision in correspondence dated 19 January 2009, primarily on the basis of his disagreement with the LGO's public interest considerations. Having undertaken a review as instructed, the LGO informed the complainant in a letter of 29 January 2009 that it had upheld its decision to refuse the request.

The Investigation

Scope of the case

7. On 9 February 2009 the complainant contacted the Commissioner to complain about the LGO's decision to withhold requested information.

8. During the course of the Commissioner's investigation, the LGO agreed to the release of a letter from Stevenage Council to the LGO dated 30 October 2007. This document is therefore not addressed in the scope of this Notice.
9. The Commissioner has also confirmed with the complainant that the focus of his request was only for copies of correspondence exchanged between the LGO and Stevenage Council and not for any additional information included in the complaints file. The withheld information captured by the request therefore consists of two letters and one email sent from the LGO to Stevenage Council, dating between 25 October 2007 and 9 November 2007.

Chronology

10. The Commissioner telephoned the LGO on 21 October 2009 to request copies of the information it had withheld from the complainant. This was received on 26 October 2009.
11. On 3 November 2009, the Commissioner wrote to the complainant setting out his initial assessment and asking for further submissions if the complainant disagreed with any of his findings.
12. In response, the complainant telephoned the Commissioner on 6 November 2009. The complainant considered that the LGO had incorrectly referred to the Act in its refusal. He also emphasised the importance of the information and therefore the need to have it disclosed.
13. On 13 November 2009, the Commissioner rang the complainant to clarify exactly the framing of his request.
14. In a letter of 17 November 2009, the Commissioner set out the specific scope of the case to the authority and asked it to provide additional supporting arguments if it maintained the information should not be released.
15. The LGO responded to the Commissioner on 27 November 2009. Having consulted with Stevenage Council, the LGO agreed to supply the complainant with a copy of the letter of 30 October 2007, referred to in paragraph 8 above. However, it considered that it was correct to refuse to disclose the remaining information.

Analysis

Procedural Matters

Section 10 - time for compliance

16. Section 10(1) of the Act requires that a public authority respond to a request promptly, and in any event, not later than the twentieth working day following the date of receipt.

Section 17 – refusing a request

17. Where a public authority believes that any exemption from part II of the Act applies, section 17(1) states that a refusal notice should be issued within 20 working days of receipt of the request as per section 10(1) of the Act. In this case, the LGO did not provide its notice within the statutory time frame and so the Commissioner considers there to be a breach of section 17(1).
18. In addition, section 17(1)(b) of the Act states that, where a public authority is seeking to refuse any part of a request, it should specify the exemption in question.
19. The Commissioner notes that the LGO did refer to section 44 as the relevant exemption in its refusal notice of 13 January 2009. However, the Commissioner considers that owing to the authority's failure to cite the specific sub-section of section 44 it was relying on, the complainant could not be certain of the grounds for withholding the information. He has therefore determined that the authority breached section 17(1)(b) in its handling of the request.

Exemptions

Section 44 – prohibitions on disclosure

20. In the first instance, the Commissioner has considered whether the appropriate access-regime would be the EIR as opposed to the Act. This because the referral of the complaint to the LGO stemmed from the purchase of Council land by a private company, with a view to developing the said land.
21. The withheld documents form part of the LGO's investigation into whether there was evidence of maladministration by the Council, given that it has a fiduciary duty to its taxpayers. As the information focuses on the administrative mechanisms attached to the complaint, rather than on the development of the land in question, the Commissioner has concluded that the Act would apply and has therefore moved to consider the application of section 44.
22. Section 44(1) of the Act provides that information is exempt information if its disclosure (otherwise than under the Act)–
 - (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.
23. The relevant prohibitory enactment cited by the LGO is section 32(2) of the LGA (full wording of which is included in the legal annex). This provides – subject to certain exceptions,– that:

“Information obtained by a Local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this part of the Act shall not be disclosed.”

24. The Commissioner is satisfied that the provenance of the information withheld by the LGO are communications which the LGO created in the course of its investigation into allegations of administrative failure, based on information received from another source. The Commissioner therefore considers that, as per section 32(2) of the LGA, the information was obtained during the course of, or for the purposes of, an investigation.
25. The complainant appealed against the LGO's decision on the grounds that the public interest under the EIR favoured disclosure of the information. Neither his request for the LGO to review its decision, nor his complaint to the Commissioner, suggested that an exception to section 32(2) of the LGA applied. There is nothing in this case to suggest that any of the exceptions to section 32(2) of the LGA would apply. The Commissioner has not therefore considered these exceptions any further.
26. Accordingly, the Commissioner has determined that the information falls within the prohibition on disclosure contained in section 32(2) of the LGA and that, as a consequence, the exemption provided by section 44(1)(a) applies. As section 44 of the Act is an absolute exemption, the Commissioner is not required to consider the public interest in disclosure.

The Decision

27. The Commissioner's decision is that the public authority correctly applied section 44(1)(a) of the Act to the withheld information.
28. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - Section 17(1) – the public authority did not issue a refusal notice within 20 working days.
 - Section 17(1)(b) – the public authority failed to specify the relevant sub-section of section 44 that it was relying upon to withhold information.

Steps Required

29. The Commissioner requires no steps to be taken.

Other matters

30. In the LGO's response to the request, it informed the complainant that both the EIR and the Act would apply to requested information.
31. The Commissioner understands that, in some cases, it will not be a simple process to identify which withheld information would fall under either legislation. Nevertheless, the Commissioner considers that an authority should, as much as possible, inform an applicant of those categories of information being considered under the Act and those being considered under the EIR.

Right of Appeal

32. 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: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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 served.

Dated the 25th day of February 2010

Signed

**Lisa Adshead
Senior Policy Manager**

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

Legal Annex

FREEDOM OF INFORMATION ACT 2000

Time for Compliance

10. – (1) 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.”

Refusal of a request

17. – (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Prohibitions on disclosure.

44. – (1) 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.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

LOCAL GOVERNMENT ACT 1974

- 32(2) Information obtained by a local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this Part of this Act shall not be disclosed except-

(a) for the purposes of the investigation and of any report to be made under section 30 or section 31 above; or

(b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this Part of this Act, by a Local Commissioner or by an officer of either Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this Part of this Act or for the purposes of an inquiry with a view to the taking of such proceedings, or

(c) for the purpose of any proceedings under section 29(9) above, and a Local Commissioner and the officers of his Commission shall not be called upon to give evidence in any proceedings (other than proceedings within paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this Part of this Act.

ENVIRONMENTAL INFORMATION REGULATIONS 2004

Interpretation

2. – (1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);
“public record” has the same meaning as in section 84 of the Act;
“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;
“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act;
and

“working day” has the same meaning as in section 10(6) of the Act.

Confidentiality of proceedings

12. – (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

...

- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;