

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2017

Public Authority: South Essex Homes
Address: Civic Centre
Victoria Avenue
Southend-on-Sea
Essex
SS2 6EL

Decision (including any steps ordered)

1. The complainant has submitted a number of requests for information to South Essex Housing (SEH). In two of his requests, the complainant has asked to be provided with the agreements with Essex and Suffolk Water and Anglian Water for the collection costs of water supply and sewerage services, and with copies of the advice of reductions in billing to the Southend on Sea Council and SEH from the Water Companies resulting from the installation of water meters.
2. The Commissioner has decided that SEH does not hold information concerning the advice of reductions in billing to SBC/SEH from the Water Companies resulting from the installation of meters in the Borough. The Commissioner has found that SEH does hold recorded information which is relevant to this, but she has decided that SEH is entitled to rely on section 40(2) to withhold it.
3. The Commissioner also finds that SEH provided the complainant with the agreement Southend on Sea Borough Council has with Northumberland Water. The Commissioner has decided that SEH breached section 10 of the FOIA by providing this information outside of the twenty working days compliance period which that section requires.
4. The Commissioner has decided that SEH has breached section 10 and 17 in the way it has dealt with the complainant's requests.
5. No further action is required in this matter.

Request and response

6. On 8 November 2016, the complainant wrote to South Essex Homes ("SEH") and submitted the first of a number of requests for information. He asked for:

"...a copy of the agreements with Essex and Suffolk Water and Anglian Water for collection of costs of water supply and sewerage services respectively."
7. On 9 December 2016, SEH sent the complainant a redacted copy of an agreement with Northumbrian Water. The complainant was advised that the commission rate had been redacted in reliance on section 43(2) of the FOIA on the grounds that its disclosure would prejudice a commercial interest.
8. On 20 December 2016, SEH wrote to the complainant in response to his emails and letters about the redacted agreement which had been sent to him. SEH advised the complainant that the agreement covers both Essex and Suffolk Water and Anglian Water.
9. SEH also provided the complainant with a redacted copy of the bill from Northumbrian Water (representing Essex and Suffolk Water) for 2016/17, together with the extract showing the bill for the complainant's address. SEH informed the complainant of how it is compensated by the water company for collecting water rates and told him that this amount is set off from the payment due to the water company for administrative convenience.
10. The complainant was advised that water refunds were made to residents of Adams Elm and The Barringtons in respect of overcharged water charges. He was advised that residents of sheltered schemes were given an ex-gratia payment in respect of heating and no other refunds have been made.
11. On 8 January 2017, the complainant wrote to SEH and asked it to undertake a review of its responses to his requests for information. In the complainant's letter he referred to 'an extract' for [the complainant's address] which SEH had already sent him. He asserted that this extract is a calculation by the RV¹ method and he asked for a similar calculation

¹ Rateable Value

for a three bedroom house, such as can be found elsewhere near to his address.

12. On 11 February 2017, the complainant sent an email Southend Borough Council. In his email he asked for:

"...unredacted copies of agreement and accounts be provided under the grounds already advised to other officers. Additionally I look for evidence of reductions in the charge from the water companies resulting from tenants opting for metering assessment of usage as an alternative to RV and charging with rent."

13. On 13 February 2017, the complainant wrote to SEH and submitted a new request for:

"...advice of reductions in billing to SBC/SEH from Water Companies resulting from the installation of meters in the Borough"

14. The Council acknowledged the complainant's new request and advised him that SEH is currently reviewing his previous requests and would include this new request with that review.

15. On 10 April 2017, SEH wrote to the complainant and provided its response to his request of 13 February and the result of its internal review concerning his request of 8 November 2016.

16. SEH informed the complainant that no records are held in respect of "...advice of reductions in billing to SBC/SEH from Water Companies resulting from the installation of meters in the Borough".

17. Where the complainant had requested details of refunds to tenants of specific schemes, or billing for properties in specific locations, SEH advised him that this information engaged section 40(2) of the FOIA and therefore it would not be disclosed.

18. SEH referred the complainant to clause 10 of Southend Borough Council's Cabinet Report of 10 November 2015 where "all background information" can be found in respect of the loss of revenue.

19. SEH confirmed its position that the complainant should request information concerning a three bedroom house in a specific location to the relevant water authority and it referred him to its explanation given in 2016 for how the Rateable Value charges are made.

20. Where SEH had redacted information in reliance on section 43(2) of the FOIA, SEH confirmed that, following further consultation with Northumbria Water, it was now able to disclose this.

Scope of the case

21. The complainant contacted the Commissioner on 17 March 2017 to complain about the way his request for information had been handled.
22. The complainant noted that SEH has disclosed an unredacted copy of the agreement for Essex and Suffolk Water but had not disclosed an unredacted invoice: He complained about the failure of SEH to provide a proper refusal notice under section 17 of the FOIA in respect of his requests and that his subsequent correspondence was not answered until SEH's internal review.
23. The complainant also complained about the length of time taken by SEH in undertaking its internal review and he argued that SEH's reliance on section 43(2), on the grounds of commercial sensitivity, as this does not take into account the 'monopoly ruling'.
24. The complainant informed the Commissioner that the Water Companies have stated they do not bill each other. He asserted that this is contradicted by the invoice which was sent to him, which he described as 'joint', and which he believes, SEH has no authority to collect on behalf of Anglian Water. It is the complainant's position that SEH has failed to mention that "an unwritten agreement (upon which they must depend to pay Anglian) existed between Northumbrian Water and Anglian".
25. Having reviewed the documents sent by the complainant in support of his complaint, the Commissioner has limited the scope of this case to the complainant's requests of 8 November 2016 and 13 February 2017, which SEH has included in its review of 10 April 2017. The Commissioner has therefore sought to determine whether the SEH has handled these two requests in accordance with the FOIA and in particular whether SEH is entitled to rely on section 43(2) of the FOIA in respect of any information it is withholding.

Reasons for decision

Request of 8 November 2016

A request for: "...a copy of the agreements with Essex and Suffolk Water and Anglian Water for collection of costs of water supply and sewerage services respectively."

Section 43(2) – Commercial interests

26. Section 43(2) of the FOIA Section provides an exemption from disclosure if the information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
27. SEH has informed the Commissioner that Northumbrian Water is the parent company for Essex and Suffolk Water and that it also collects sewerage charges on behalf of Anglian. The Council's agreement is with Northumbrian Water and there is no separate agreement with the other parties. The Council is invoiced by Northumbrian Water, although the invoices are badged as Essex and Suffolk Water. The invoices also include the collection of sewerage charges on behalf of Anglian.
28. Therefore, there are no invoices held by the Council for water or sewerage services other than those from Northumbrian Water.
29. On 9 December 2016, the complainant was provided with a copy of the Council's agreement with Northumbrian Water. The rate of commission was redacted in reliance on section 43(2) of the FOIA, on the grounds that its disclosure would be likely to prejudice a commercial interest. The decision to withhold the redacted information was made taking into account the view of Northumbrian Water.
30. On 10 April 2017, following a review of its previous decision, SEH advised the complainant that it had again consulted Northumbrian Water and subsequently this had resulted in a reversal of their objection to disclosure. Given that SEH's reliance on section 43(2) had fallen away, the complainant was advised that it no longer relied upon this exemption and he was sent an unredacted copy of the agreement between the Council and Northumbrian Water.
31. The Commissioner accepts that SEH has provided the complainant with the information it holds relevant to his request of 8 November 2016. The disclosure of the unredacted agreement was made significantly outside of the twenty working day compliance period which is required by section 10 of the FOIA and therefore the Commissioner has decided that SEH has breached that section.
32. The Commissioner accepts the clarification provided to her by SEH, that Northumbrian Water is the parent company for Essex and Suffolk Water and that it collects sewerage charges on behalf of Anglian. It is clear to the Commissioner that the Council has appointed Northumbrian Water Ltd (trading as Essex and Suffolk Water) as the water services provided in its area. She also accepts SEH's explanation that Northumberland Water Ltd acts as an agent for Anglian in collecting sewerage charges from the Council.

33. The Commissioner has decided, on the balance of probability' that neither the Council nor SEH hold any separate agreement(s) with the other parties for water or sewerage services. She is therefore obliged to rebut the complainant's assertion that SEH has no authority to collect sewerage charges on behalf of Anglian via Northumbrian Water Ltd.

Request of 13 February 2017

Request for "...advice of reductions in billing to SBC/SEH from Water Companies resulting from the installation of meters in the Borough"

34. It is SHE's position that it holds no records in respect of "...advice of reductions in billing to SBC/SEH from Water Companies resulting from the installation of meters in the Borough".
35. The public authority has assured the Commissioner that, on 15 May 2017, it advised the complainant of the number of properties which had moved to direct billing for each of the years 2014/15, 2015/16 and 2016/17 and the consequent reduction in the amount billed by Northumbrian Water.
36. On 21 June 2017, the Council sent the complainant unredacted invoices for the years 2014/15, 2015/16 and 2016/17. The Council did not provide the complainant with a schedule of charges to individual households because the information is considered to be the personal data of the persons concerned. The Council considers that it would be unfair to reveal the information to the complainant or any third party and therefore it has withheld this level of information in reliance on section 40(2) of the Freedom of Information Act.
37. Notwithstanding its application of section 40(2), the Council provided the complainant with the range within which water charges were billed for properties and it explained that it was not possible to deduce a ratio or percentage in relation to refunds of water charges.
38. The Council advised the Commissioner that it considers the public interest in the matter is met by the provision to the complainant of the unredacted invoices and the statistics concerning the numbers of properties moving to directly billed water supply between 2014/15 and 2016/17, together with the reductions in billing for those periods.
39. The information which the Council is withholding from the complainant is in the form of a spreadsheet. The spreadsheet contains 11,345 records under the following headings: Account Reference; Invoice Number; Property reference; Place Name; Street Number; Street; Area; Town; Postcode; Type of Connection; Main Property Reference; Charge Type; RV Book Reference; RV; Net Balance; VAT; Gross Balance; Period Start; period End.

40. The complainant seeks information concerning refunds made to tenants of specific schemes and billing for properties in specific locations and in particular, he has asked to be provided with the level of refunds to Adam's Elm House. The complainant asserts that the information belongs to SEH and is not personal to any individual.
41. In order to meet the complainant's request, on 15 May 2017, the Council provided him with the total amount refunded to residents of sheltered housing complexes, broken down between water and heating charges. The Council withheld refunds made to the homes of individual residents in reliance on section 40(2) of the FOIA. The Council considered that this information is the personal data of the persons concerned and it would be unfair to reveal the information to a third party.
42. The withheld information is again in the form of a spread sheet. The spreadsheet contains 852 records under the following headings: Type (a generic reference); Supplier ID; Supplier ID (name of tenant); Address; Town; Postcode; Cheque number; Transaction number; Amount refunded.
43. For the water refunds there are 216 records and the headings are: Type (a generic reference); TT (a generic reference); Transaction Number (a unique reference); # (a generic reference); Transaction date; Period; Text (type of refund); Ap/Ar ID (a reference number); Ap/Ar ID (T) (name of recipient); Address; Town; Postcode; Amount Refunded.
44. SEH has advised the Commissioner that it considers all of the withheld information is the personal data of the individual bill payers. SEH holds this position because the withheld information includes and is specific to bill payers' addresses and includes the amounts of refund – or money owing for their heating and water collection services, and the amounts of any cheque paid to those individuals.
45. Persona data is defined by section 1 of the Data Protection Act 1998. This states:

“personal data” means 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.”
46. The Commissioner readily accepts that the information which SEH is withholding from the complainant satisfies the definition of personal

data. She must now consider whether SEH would contravene the first data protection principle if it was to disclose that information.

47. The first data protection principle states:

“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.”

48. In this case, the withheld personal data is comprised of information concerning the bill payers’ personal lives and therefore SEH considers that disclosure of this personal data would be unfair to the data subjects.

49. It is SEH’s view that the bill payers would have no expectation that their personal data would be disclosed to the world and would consider it particularly unreasonable for their personal data to be disclosed to a requester who is a neighbour.

50. This is particularly so, as it is thought likely that the requester would use the withheld information to lobby opinion locally and encourage behaviour change which is not always welcome.

51. SEH has not sought the consent of the data subjects in respect of the potential disclosure of their personal data. Rather, SEH has made the determination for itself based on the principle that disclosure of the requested information is generally considered unfair and beyond a person’s reasonable expectation.

52. The Commissioner agrees with the approach taken by SEH.

53. In addition to considering whether disclosure of the requested information would be fair to the data subjects, the Commissioner has also considered whether disclosure would meet one of the conditions for processing data provided by Schedule 2 of the Data Protection Act. She has considered condition 6 to be relevant in the circumstances of this case.

54. Condition 6 of Schedule 2 states:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in

any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

55. SEH accepts that there is a legitimate interest supporting the disclosure of information concerning the issues associated with the refunds made to bill payers. This is particularly so, as there is an on-going class law suit concerning the charges and there has been local press coverage of this.
56. Notwithstanding this legitimate interest, SEH asserts that disclosure of information required at the level required by this request does not outweigh the interests of the data subjects.
57. The Commissioner has considered the position advanced by SEH. She has determined that it would be unfair to the bill payers to have their personal data disclosed to the world and that disclosure would contravene the first data protection principle. The Commissioner recognises and agrees with the points raised by SEH in respect of condition 6. In the Commissioner's opinion, disclosure of the information contained in the spreadsheets would be a significant intrusion into the bill payers' private affairs and therefore condition 6 is not met.
58. The Commissioner's decision is that SEH is entitled to withhold the spreadsheets which are relevant to the complainant's request of 13 February 2017.
59. The complainant has asserted that SEH failed to issue a proper refusal notice under section 17 of the FOIA.
60. The Council refutes this assertion by pointing out that, during its lengthy correspondence with the complainant, it advised the complainant “of any relevant exemption and the reason why it applies”. SEH also provided the complainant with confirmation of whether information relevant to his requests is held.
61. Notwithstanding the above, SEH accepts that it could have better explained the public interest test to the complainant. It says, “Normally we would explain the complaints procedure when responding; however in this case [the complainant] was told that the SEH was not willing to enter into further communication on the subject due to the unreasonable burden placed on the organisation by his contacts. He was however advised that he could use the complaints procedure to challenge having been provided with limited contact with SEH.”
62. The Commissioner would remind SEH of the provision of section 17(1) of the FOIA. This states:

"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."

63. The Commissioner has examined SEH's letter to the complainant of 20 December 2016. It is clear to the Commissioner that SEH failed to cite section 43(1) in respect of the redactions made to the bill from Northumberland Water for 2016/17. The Commissioner must therefore find that SEH has breached section 17(1) of the FOIA.

Other matters

64. One of the complainants raised by the complainant concerned the length of time taken by SEH to carry out its internal review.
65. The complainant requested an internal review on 25th January 2017 but it was not completed until 10th April 2017. SEH advised the Commissioner that the delay was due in part to re-opening with Northumbrian Water their position regarding the potential prejudice to their commercial interests. It advised the Commissioner that the Council's legal officers had also to be involved because the issue of water rate collection for local authority properties is being tested through a class action at present and it had to be ensured that any information released did not prejudice the Council's position.
66. In view of SEH's explanation, the Commissioner understands and accepts the reasons given by SEH for its need to consult with Northumbrian Water and why this resulted in a protracted period for its internal review. That said, the Commissioner would encourage SEH to complete its internal reviews in a more timely manner in the future and where third parties are involved, she would advise SEH to impress on those parties its need to conduct a timely review.
67. Additionally, the complainant's contacts with the Council and SEH have been prolific. This has made communication with the complainant difficult and at times confusing, particularly when he is contacting multiple persons and bodies about the same issue.

68. Ultimately it was decided to provide the complainant with a single point of contact at SEH, in order to manage his contacts effectively. It cannot be denied however that the review process took longer than the period recommended by the Commissioner.
69. Some of the complaints raised by the complainant concern the failure of SEH to explain or clarify the situation regarding the billing by Northumbrian Water for Anglian Water. He has referred to an "unwritten agreement".
70. The Commissioner is obliged to point out that the FOIA is concerned with the provision of recorded information held by a public authority at the time it receives a request. This means that 'unwritten agreements', are by definition, not caught by the legislation. The public authority is under no obligation to create recorded information in order to satisfy a request and its obligation to provide advice and assistance under section 16 of the Act, extends only to recorded information.
71. Additionally, the complainant has expressed his concern about SEH's provision of incorrect information and of information which he considers is "not the province of water companies" and where SHE is responsible for deciding the allocation of charges.
72. The Commissioner must point out that the interpretation of recorded information and disclosed under the FOIA is not a matter which she is able to comment on.

Right of appeal

73. 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

74. 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.
75. 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

Andrew White
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