

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2019

Public Authority: Arun District Council
Address: Civic Centre
Littlehampton
West Sussex
BN17 5LF

Decision (including any steps ordered)

1. The complainant has asked Arun District Council for a copy of the affidavit requested by Mr Justice Holgate in the High Court of Justice in case CO/901/2017.
2. The Commissioner's decision is that Arun District Council has correctly applied section 32 of the FOIA to the affidavit requested by the complainant.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 25 May 2018, the complainant submitted the following request for information to the Arun District Council via the WhatDoTheyKnow website:

"In the matter between Aldingbourne Parish Council and Arun District Council heard in the High Court of Justice Queen's Bench Division, The Administrative Court on 7th December 2017 (CO/901/2017) Mr Justice Holgate required the council to submit an affidavit to explain why the council handled the case in the way which it did.

May I please have a copy of that affidavit - which is a public document."

5. The Council responded to the complainant's request on 18 June 2018 by confirming that it holds a copy of the requested affidavit and by advising

him that it was refusing to disclose it in reliance on section 32(1)(b) of the FOIA. The Council said, "The reason for the exemption is that the affidavit was served by Arun, as a public authority, for the purposes of the court proceedings. A copy of the affidavit was shared with parties to the litigation proceedings only".

6. On 25 June 2018, the complainant wrote to the Council and asked it to undertake an internal review of its handling of his request.

Referring to the wording of the section 32(1)(b) exemption, the complainant asserted that, "This document is not for the purposes of proceedings, as the proceedings were concluded. They were for the purpose of explaining the council's behaviour during the proceedings, which is completely separate and not part of those or any other proceedings".

7. The Council provided the complainant with the results of its internal review on 20 July 2018. The Council advised him that the affidavit is exempt from disclosure by virtue of section 32(1)(a) and 32(1)(b) of the FOIA and it informed him that:

"The affidavit was requested by Mr Justice Holgate during the proceedings to explain Arun District Council's conduct of the case in those proceedings. Having requested this, Mr Justice Holgate then moved to consider costs. The Order setting out the settlement, the costs and the requirements for the affidavit was drawn up as a result of those proceedings. The affidavit was therefore submitted in connection with the proceedings and will form part of the Court record for those proceedings".

8. The Council explained that the affidavit was only created for the purposes of the court proceedings and that it would not have been in existence but for those proceedings. It said, "The affidavit was filed with the court by a public authority and it, therefore, follows that section 32(1)(a) and (b) are engaged in this instance".

Scope of the case

9. The complainant contacted the Commissioner on 19 August 2018 to complain about the way his request for information had been handled.

10. The complainant said:

"Mr Justice Holgate described the Council's performance in this case as 'lamentable' and I feel that the Council's response should be made public. The public has a right to know how badly their council performed

in this matter. I am concerned that the Council may be taking liberties in order to hide its poor performance from the public. I therefore request that the Information Commissioner investigates this matter.”

11. The Commissioner advised the complainant that her investigation would be focussed on whether Arun District Council is entitled to withhold the affidavit he has requested in reliance on Section 32 of the FOIA.

Reasons for decision

Section 32 – Court records, etc.

12. Under section 32 of the FOIA,
 - (1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
 - (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
 - (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter.
13. The Council has confirmed to the Commissioner that it relies on section 32(1)(a) and 32(1)(b) of the FOIA to withhold the affidavit requested by the complainant.
14. The Council has provided the Commissioner with a copy of the affidavit sworn on 14 December 2017 and a copy of the Court Order of 7 December 2017 which required the affidavit.
15. The Council points out that the affidavit was created by the Council in response to an order of the High Court made during Judicial Review proceedings. The affidavit required the Council to account for its actions in the lead up to, and during, the hearing at the High Court.
16. On the grounds that the affidavit was created solely for the purposes of the Judicial Review proceedings, the Council asserts that it is exempt from disclosure by virtue of it being a document filed with the Court for the purposes of section 32(1)(a) of the FOIA.
17. Further, as the Affidavit was served by the Council, the Council asserts that section 32(1)(b) may also be relied on.
18. The Council argues that the affidavit is exempt from disclosure if it is held only by virtue of being contained in a document which has been filed with, or placed in the custody of a court for the purpose of

proceedings in a particular cause or matter, or to any document served upon, or by, a public authority in a particular cause or matter.

19. In relying on section 32, public authorities have no obligation to disclose any information in connection to the proceedings of a court, inquiry or arbitration outside of those proceedings.
20. In this case, the affidavit was created at the request of Mr Justice Holgate in the proceedings of a Judicial Review of the Local Planning Authority's decision to grant planning permission. These proceedings took place in the High Court of Justice, Queens Bench Division.
21. Mr Justice Holgate ordered the affidavit for the purpose of having the Council explain its conduct of the case in those proceedings. Having ordered the Council to produce the affidavit within a required timescale, Mr Justice Holgate then moved to consider costs.
22. The Order setting out the settlement, the costs and the requirements for the Affidavit was drawn up as a result of those proceedings and therefore the affidavit is part of the Court record for those proceedings.
23. Paragraph 4 of the Court Order confirms that the Council was required to file and serve an affidavit explaining its conduct of this litigation. Sub-sections (1) to (11) of that Order confirm what the affidavit was required to address.
24. The affidavit was not acquired by the Council: Rather it was created by the Council solely for the purpose of the proceedings of a court and therefore it is held by the Council 'only by virtue' of those proceedings.
25. The Commissioner is content that the affidavit was created for the purpose court proceedings. She does not agree with the position advanced by the complainant on 25 June 2018 where he argues that section 32 does not apply to the affidavit because it was not created for the purposes of court proceedings. He asserts that the proceedings in question were already concluded and that the affidavit was requested solely for the purpose of explaining the Council's behaviour during those proceedings.
26. It is clear to the Commissioner that the affidavit was created for the purpose of the Judicial Review proceedings referred to above: It was manifestly a requirement of the Court for the purpose of those proceedings.
27. This position was confirmed to the Council when it sought clarification from Mr Justice Holgate as to whether the Council's conduct was a private matter between the Council and the Court or whether the

affidavit formed part of the Court proceedings and was subject to disclosure to the parties in the Court action.

28. Mr Justice Holgate's clerk confirmed to the Council that the affidavit was to be disclosed to the parties to the action. In accordance with instructions from the Court, the affidavit was marked 'Private and Confidential' and was only circulated to the parties to the Judicial Review proceedings. Therefore the affidavit is not a public document.
29. The complainant's argument that the proceedings were concluded is not relevant to the Commissioner's decision in this case. The Commissioner relies on the Supreme Court's decision in *Kennedy v The Charity Commission* [2014] UKSC 20 (26 March 2011), which states:

`...section 32 was intended to provide an absolute exemption which would not cease abruptly at the end of the court, arbitration or inquiry proceedings, but would continue until the relevant documents became historical records...' (Para 34).
30. Having considered the Council's representations and the documents it has provided in support of its position, the Commissioner has decided that the Council has properly applied the provision of sections 32(1)(a) and 32(1)(b) to the affidavit requested by the complainant.
31. As section 32 is an absolute exemption the Commissioner is not required to consider the public interest test in respect of the requested affidavit.

- 32. Right of appeal
- 33. 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

- 34. 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.
- 35. 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
Group Manager
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF**