

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2019

Public Authority: Sandwell Metropolitan Borough Council

Address: Sandwell Council House

Freeth Street

Oldbury

B69 3DE

Decision (including any steps ordered)

1. The complainant has requested information from Sandwell Metropolitan Borough Council ("the council") relating to internal investigation report/s about certain council officers that had resulted from an independent commissioned report that had been published on the council's website. The council withheld the requested information under section 30 and section 40(2).
2. The Commissioner's decision is that the council has correctly withheld this information under section 40(2). However, she also finds that the council breached section 10(1) by failing to respond to the complainant within the statutory time frame.
3. The Commissioner requires the public authority to take no further steps.

Request and response

4. On 5 October 2017 the complainant wrote to the council and requested information which, due to its content, is contained in a confidential annex separate from this decision notice. In order to provide some clarity the request is for an internal report and any earlier versions that were later amended.
5. The council responded on 15 November 2017 and refused to provide the requested information, citing section 30(1) of the FOIA.
6. The complainant asked for an internal review on 13 December 2017. There was another response to this request on 27 June 2018 which was not a review. The council applied the same exemption - section 30(1) but also referred to section 40 (personal information).
7. The council provided an internal review on 14 August 2018 and maintained its original position regarding the application of section 30(1) but explained that "*minor amendments*" had been made to the source document, and that there were no other versions of the report held. Whether the council was still applying section 40 was not made clear at review stage.
8. The council later confirmed in its responses to the Commissioner that it was relying on section 40(2). At the same time the council confirmed to the Commissioner its reliance on section 30(1) and (2).
9. The Commissioner has had sight of the withheld information which consists of internal human resources reports on individual staff members and an overview document relating to these same officers and the investigations conducted regarding each one. These disciplinary investigations followed an independent investigation by Gowling WLG about land sale transactions and other matters that had been published on the council's website. The disciplinary investigations and the subsequent reports on individual members of staff were conducted after the legal opinion from Mr James Goudie QC regarding the Gowling WLG report had also been published on the council's website.¹ The requested information has not been published, though some of its content includes the paraphrasing of details from the published information.

¹ <http://www.sandwell.gov.uk/reports>

Scope of the case

10. The complainant contacted the Commissioner on 16 April 2018 to complain about the way his request for information had been handled. He stated that the council had failed to respond to his request and ignored a request for a review.
11. The Commissioner considers that the scope of this case concerns the council's application of section 40(2) and section 30 to the withheld information.

Reasons for decision

Section 40(2) – Personal information

12. At the time of compliance with the request, the relevant legislation in respect of personal data was the Data Protection Act 1998 ("the DPA 1998"). The determination in this case must therefore have regard to the DPA 1998, and the terms of the FOIA that were applicable at that time.
13. Section 40(2) states that:

"Any information to which a request for information relates is also exempt information if–

 - (a) it constitutes personal data which do not fall within subsection (1), and*
 - (b) either the first or the second condition below is satisfied."*
14. Section 40(3) of the FOIA explains the following –

"The first condition is–

 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–*
 - (i) any of the data protection principles..."*

Is the withheld information personal data?

15. In order for the exemption to apply, the information being requested must constitute personal data as defined by section 1 of the DPA 1998.

16. Personal data is defined by section 1 of the DPA 1998 as:

*"...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, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..."*

17. The complainant asked for the internal report/s about individual staff members. The Commissioner has reviewed the withheld information which consists of the investigator's paraphrasing of the publicly available information and their conclusions about whether the individuals concerned had breached the code of conduct for employees. The Commissioner considers that the information is biographical, containing information about allegations connected to clearly identified individuals and information about other third parties. The withheld information is therefore personal data.

Does the information contain any sensitive personal data?

18. Sensitive personal data is defined in section 2 of the DPA. It is personal information which falls into one of the eight categories set out in section 2 of the DPA.

19. Having reviewed the withheld information, the Commissioner is satisfied that some of the withheld information is sensitive personal data within the categories listed in the DPA 1998.

Would disclosure breach the data protection principles?

20. Schedule 1 of the DPA 1998 sets out the data protection principles. The first data protection principle says personal data should only be disclosed if it is fair and lawful to do so. The conditions for releasing personal data are set out in schedule 2.

21. The Commissioner has identified the first data protection principle as relevant to this request. The principle requires the following –

"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."*

22. In considering whether it would be fair to release this information the

Commissioner needs to balance the reasonable expectations of the data subjects and the potential consequences of disclosure set against the legitimate public interest there may be in disclosing this information.

Reasonable expectations

23. The council argued that the information detailed in the evidence relating to the reports is personal data, some of it sensitive. It relates to the individual's public life and the actions they carried out whilst in that role. It is the council's view that none of the individuals could have envisaged that this particular information would be shared and the consent of the individuals concerned has not been provided for the release of this information.
24. The requested information amounts to disciplinary investigations on the individuals concerned. There is a reasonable expectation that internal disciplinary matters will be kept confidential, whatever the status of the staff member concerned. The Commissioner's Guidance on section 40 states the following:

"Information relating to an internal investigation or disciplinary Hearing will carry a strong general expectation of privacy. This was recognised by the Information Tribunal in the case of Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038, 29 December 2008)".

25. The council's view is that the individual employee information regarding disciplinary proceedings is not in the public domain and therefore it should not be released. However, the Commissioner considers that the reasonable expectations of non-disclosure by the primary individuals regarding their personal information would have been lessened by the personal information that the council had already placed in the public domain.

Consequences of disclosure

26. The council further argued that it would be extremely distressing for the individuals concerned to have this information released. It was also suggested that the council might be in breach of its contractual duties as some of these individuals may have left under confidential settlement agreements.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

27. The Commissioner accepts that the requested information that was investigated by the council relates to their public life. She considers

disclosure in such circumstances to be less likely to be unfair than if it concerned their private life. However, information relating to an internal investigation still carries a strong expectation of privacy even if it concerns senior staff.

28. The Commissioner agrees that the consequences for the third parties concerned would be likely to be distressing and the council's contractual duties in relation to these individuals could be compromised. Set against this there are legitimate interests in disclosure and the fact that personal information was published by the council on its website within the Gowling WLG report and the QC opinion clearly suggests that the council thought so too.
29. The Commissioner considers, however, that there is a difference between publishing the commissioned findings of an independent investigation into allegations about land sales and other matters that names certain individuals and the release of internal information about named individuals and the management of employment matters relating to them.
30. As a result of the report and the QC opinion the council looked at the role of individual council staff and considered whether any breaches of the employee code of conduct had occurred. The Commissioner has concluded that it would not sufficiently improve public understanding of the council's decision-making regarding allegations about its staff to release this information and that the arguments for disclosure are insufficient to outweigh the individuals' rights of privacy. Therefore releasing this information would be in breach of the first data protection principle.
31. For the reasons given above, the Commissioner concludes that the disclosure of the third party personal data requested would be unfair as it is exempt under section 40(2) of the FOIA by virtue of section 40(3)(a)(i).
32. As the Commissioner is satisfied that the requested information is personal data, she has not gone on to consider the application of section 30.

Section 10 – time for compliance

33. Section 10(1) of the FOI Act says that:

"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."

34. The council exceeded the statutory timeframe by responding late to the requester and therefore breached section 10 of the FOIA.

Other matters

35. The council provided an internal review eight months after it had been requested by the complainant. The Commissioner has referred to internal review delays by the council in several recent decision notices and she considers this to be similarly unacceptable. She expects the council to take no longer than the maximum 40 days set out in her guidance though she is aware that these are issues the council is addressing.

Right of appeal

36. 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

37. 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.
38. 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

**Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
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