

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2023

Public Authority: Sandwell Metropolitan Borough Council
Address: Oldbury Council House
Freeth Street
Oldbury
B69 3DE

Decision (including any steps ordered)

1. The complainant has requested information about the departure of the previous Chief Executive ("CEO"). Sandwell Metropolitan Borough Council ("SMBC") supplied some information, but withheld information related to payments, using section 22 of FOIA (Information intended for future public publication). It also refused to confirm or deny holding information within the scope of some parts of the request.
2. The Commissioner's decision is that SMBC is entitled to rely on section 40(5B) (Personal Data) in the manner that it has done. The Commissioner has found that SMBC is not entitled to rely on section 22 to withhold information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the total payment made to the outgoing CEO.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The requests that form the basis of this decision notice form part of a protracted exchange between the complainant and SMBC. In the interests of informing the analysis that follows, the Commissioner has reproduced that correspondence in full, but has highlighted those parts of the correspondence that seek recorded information in bold.

Request one

6. On 2 August 2021, the complainant wrote to SMBC and requested information in the following terms:

"On a date unknown Sandwell Labour Leader (name redacted) met with Chief Executive David Stevens.

Please provide the internal records of the meeting including the date, times, duration, location of the meeting and all notes of the meeting save in so far as the latter constitute personal data to Stevens.

Please list all other employees of SMBC or third parties present (to obviously include all members of HR department present). If there was more than one meeting on the relevant date, please provide the like information for each and every meeting.

Please provide the records stating precisely what time Stevens was placed on gardening leave.

Please provide the same details of all meetings as above between the Cllr (Name redacted) and Stevens thereafter and list all others present."

7. On 2 September the complainant wrote to SMBC to ask when he could expect a response.
8. On 2 September SMBC wrote to the complainant to seek clarification for dates and timeframes to assist them in their searches to locate information for the meetings between the Labour Leader and CEO. SMBC apologised for any delays in contact as the request was mistakenly opened as a subject access request (SAR) under Data Protection.
9. On 13 September 2021, the complainant corresponded with SMBC as follows:

"This response is vexatious and a deliberate attempt to subvert the FOIA.

(Name redacted) met with Stevens and attempted to sack him. Stevens left SMBC on gardening leave.

The lawyers worked out a massive compensation package (a matter of intense public interest) and details of the meetings will be known to them at least.

You will have a security record of when Stevens left OCH.

The wording of the original request is absolutely clear, and I now expect you to comply with the law and reply to it."

10. SMBC responded on 16 September 2021. It stated that

"The Council does not hold this information relating to the 'removal of the Chief Executive from post.'

Mr Stevens was not placed on gardening leave.

The Council denies that:

- the request for clarification of your FOIA was an attempt to subvert the FOIA.
- the Leader met with David Stevens and attempted to sack him
- David Steven's was placed on gardening leave. We are therefore unable to provide you with a date for this. We confirm that he left the Council's employment on 31st July 2021.
- lawyers worked out a massive compensation package"

11. On 17 September the complainant corresponded with SMBC as follows:-

"A point of clarification. There does not appear to be a reply to the question about lawyers working on a compensation package. It is left hanging in the air in your response.

Was this an accidental omission?"

12. On 17 September SMBC responded as follows:

"The response clearly states that the Council denies that lawyers worked out a massive compensation package".

13. On 22 September 2021, the complainant requested an internal review and sought further information in relation to the "removal of the Chief Executive from post" as follows:

"Let me go back to the precise wording of the original request. I request the Review based on that wording.

Please state the date(s) of all meetings between (Name redacted) and Stevens to discuss the latter's departure from SMBC (with the ancillary information in the original request).

Stevens suddenly left the building. If he was not on gardening leave why was he absent from his post?

You are implying that Stevens resigned from his post. If that is your contention, why was he entitled to a large capital payment?"

14. SMBC wrote to the complainant on 20 October 2021. It stated that

"Regarding your first point I can confirm that, as previously stated, the Council does not hold the information requested (being information concerning meetings between the Labour leader and Chief Executive to discuss the latter's departure from SMBC).

Regarding your second point, the Chief Executive took annual leave around the time in question, as has previously been confirmed in press reports.

With regard to your final point, the Freedom of Information Act 2000 allows requestors to request recorded information, subject to any exemptions that may apply. Your comment and question at point 3 is not such a request and as such cannot be answered under the provisions of the Freedom of Information Act."

Request 2

15. On 20 November 2021, the complainant made a request for additional information as follows: -

"Since making this request there has been a material disclosure of information by SMBC in that it has been publicly claimed that Stevens was not sacked but left due to "early retirement" which directly contradicts information passed to me. And, of course, Cllr (name redacted) has run away.

Before I take this matter further may I ask you to reflect on your reply and consider whether you can now confirm the correct position. **How did Stevens allegedly tender his early retirement and to whom?**

You have a legal duty to disclose any capital payment to Stevens in the Council's accounts and there is no valid reason you cannot disclose that information now."

16. On 5 January 2022, having not heard from SMBC to his information request of 20 November 2022, the complainant wrote to SMBC as follows

"You will be well aware that the ICO has written to you because of the illegality in applying a unilateral time limit for requesting an internal review. The IC has advised you that you must comply with the code of conduct and accept requests for internal reviews made within 40 working days - which this one was.

Accordingly, please now deal with the internal review in this matter.

I should add at this stage that a person purporting to be an employee of SMBC telephoned me to say that your response that SMBC denies that lawyers worked out a compensation package is a lie. I have no means of verifying the truth of this but the purported employee states that Sandwell did incur legal costs (possibly via third party solicitors) and that, in any event, SMBC lawyers or instructed lawyers definitely entered into negotiations with Stevens's solicitors."

17. SMBC wrote to the complainant on 2 February 2022 and provided an internal review response on this matter upholding its original position as follows:

"We neither confirm nor deny that we hold information falling within the description specified. The duty in Section 1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of Section 40 (5B) (a) (I) of that Act - the duty to confirm or deny does not arise if to do so would contravene any of the data protection principles."

18. On the 16 February 2022, the complainant wrote to SMBC stating: -

"You have a legal duty, irrespective of Data Protection principles, to publicly state payments to Senior Officers. State the payments made in Municipal Year 2021 to 2022 to David Stevens.

On 5th July 2021 members of SMBC staff started to inform me that Stevens had been sacked. There is no reported sighting of him at Oldbury Council House after that date even though it is reported - again by SMBC staff - that lawyers were engaged in a legal dispute and working on a compensation package.

You have stated that Stevens was not on gardening leave.

On what date precisely did Steven's employment with SMBC officially terminate? If later than 5th July 2021 what was his employment status after that date."

19. On 18 February 2022, SMBC provided a final response to the complainant for both requests as follows: -

"The Council in our response of 16 September 2021 confirmed Mr Stevens left the Council's employment on 31 July 2021.

To the other issues raised in your email the response to the internal review stands. We neither confirm nor deny that we hold information falling within the description specified. The duty in Section 1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of Section 40 (5B) (a)(i) of that Act - the duty to confirm or deny does not arise if to do so would contravene any of the data protection principles. This should not be taken as an indication that the information you requested is held by us."

Scope of the case

20. The complainant contacted the Commissioner on 16 March 2022 to complain about the way his request for information had been handled. The complainant requested "full disclosure" as a matter of "intense public interest."
21. Due to the amount of correspondence between the complainant and SMBC which included both requests for recorded information and general commentary on the circumstances surrounding the departure of the CEO (David Stevens) from SMBC, both of which SMBC attempted to respond to, the Commissioner sought to clarify SMBC's position on the relevant matters and has set out details on the attached appendix to this decision notice.
22. The Commissioner notes that SMBC provided the complainant with the date the CEO ceased to be employed, but confirmed it did not hold further information within the scope of request one.
23. The Commissioner therefore considers the scope of his investigation is to determine whether SMBC is entitled to rely on section 22 of FOIA to withhold the information on payments made to the CEO and section 40(5B) of FOIA to neither confirm nor deny that it holds the remaining information related to the circumstances for leaving SMBC.

Reasons for decision

Section 40(5B) personal information

24. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the requested information – this is referred to as the duty to confirm or deny.
25. However, section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether the authority holds the information does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR (General Data Protection Regulation).
26. For SMBC to be entitled to rely on section 40(5B)(a)(i) the following two criteria must be met:
 - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.
27. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming or denying that the information is held reveal personal data?

28. Section 3(2) of the DPA (Data Protection Act) 2018 defines personal data as: -

"Any information relating to an identified or identifiable living individual."
29. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
30. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
31. In this case, the Commissioner recognises that the request is predicated on the complainant's assumption that the CEO left on particular terms.

Therefore, hypothetically, confirming that this information is held (if indeed that were SMBC's true position) would confirm that that assumption is true. Denying that information is held would not reveal the precise terms, but it would narrow the range of possibilities and SMBC cannot only refuse to confirm or deny when it actually holds information – to do so would undermine the purpose of refusing to confirm or deny in the first place.

32. In the circumstances of this case and having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the CEO by name and the specific post that he held at SMBC. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
33. For the reasons set out above the Commissioner is satisfied that if SMBC confirmed whether or not it held the requested information, it would be indicating the terms on which the CEO ceased their employment. The first criterion set out above is therefore met.

Lawful basis

34. Article 5(1)(a) of the GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
35. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
36. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
37. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
 - i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
 - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
38. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate Interests

39. The complainant in his correspondence with the Commissioner stated that it was a matter of great public interest that David Stevens, the CEO of SMBC appeared to have received a very large sum of public money to which he was not, (in the complainant's view), entitled and that he had been "sacked" from this position.
40. The Commissioner considers that there is a legitimate interest in understanding the circumstances as to why David Stevens left his position and whether this affected the payments made to him so that the public can be reassured that value for money had been achieved. The higher the overall size of the remuneration package and the more senior the role, the stronger that interest will be.

Is confirmation or denial necessary?

41. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make confirmation that the requested information is (or is not) held unnecessary. Confirming or denying that the information is held under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
42. Providing confirmation (or denial) that the information is held is providing it to the world at large – not just to the individual requestor. It is the equivalent of SMBC confirming (or denying) on its website that the information is held.
43. The Commissioner recognises that information relating to personnel matters such as circumstances for leaving employment and details of the terms on which an individual leaves employment are inherently "personal and private" in nature to the individual involved and are not ordinarily published as part of SMBC transparency disclosures.
44. Whilst SMBC has publicly confirmed the departure of the CEO from his employment at SMBC, both on their social media pages and website and also via the local press, the terms on which he departed are his personal information which is confidential.
45. The Commissioner considers that it would be necessary to confirm or deny whether the requested information is held to meet the legitimate interests in this case

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

46. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
47. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that the public authority will not confirm whether or not it holds their personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
48. It is also important to consider whether confirmation or denial would be likely to result in unwarranted damage or distress to that individual.
49. As the CEO at SMBC, Mr Stevens could reasonably expect that the terms for his departure would be kept confidential and not disclosed more widely in response to a freedom of information request unless there was exceptional justification for doing so – such as if he had been dismissed for gross misconduct.
50. Equally SMBC must consider the balance of its duty to be open, transparent and accountable to their taxpayers, whilst respecting the duty of confidence owed to its ex-employees.
51. Based on the above factors, the Commissioner has determined that the legitimate interest in confirming whether or not the requested information is held would not outweigh the individual's rights and freedoms.
52. As there is no lawful basis for processing, confirming or denying whether the requested information is held would not be lawful.
53. The Commissioner is therefore satisfied that SMBC was entitled to rely on section 40(5B) of FOIA to neither confirm nor deny that the requested information is held.

Section 22(1) – information intended for future publication

54. Section 22(1) of FOIA says that information is exempt information if:

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

55. For the exemption in section 22 to apply, the public authority must have a settled expectation that the information will be published at some future date – even if no precise date has been set.
56. SMBC confirmed that it held the information at the time the request was made in August 2021, as well as confirming its intention to publish the information, both in the financial year end accounts and on its website. It did not provide an expected publication date.
57. SMBC has confirmed to the Commissioner that the publication date for the 2020/2021 Statement of Accounts is still to be determined as it is dependent on the completion of an audit by the Council's external auditors. The financial statements will include payments information for all employees, including those made to the CEO as an aggregate sum under the summary of 'Termination Benefits' for the relevant period.
58. Additionally the financial statements are not expected to be presented to SMBC's Audit and Risk Committee until 16 March 2023 and a time frame cannot be given for agreement, finalisation and publication.
59. SMBC argued that there are reasonable grounds to publish the requested information as planned. It should be entitled to complete and then publish financial statements in accordance with accounting practices and applicable regulations, rather than having the timing of disclosure dictated by individual requests for information.
60. Early piecemeal and drip feeding disclosure of information would likely create unnecessary disruption to the planned release and reignite public debate on the issue. SMBC was concerned that isolated elements of the accounts, out of context of the overall information, would not facilitate public understanding and the withholding of information and reliance by SMBC on section 22 exemption was only on a temporary basis.
61. Having considered the arguments, the Commissioner is not satisfied that the exemption is engaged.

62. Firstly, it is not clear whether the precise information that the complainant has requested will actually be published. Some of SMBC's responses have indicated that it intends to publish a single figure for all staff who left during the same period. That is not the same as publishing payments made to the CEO.
63. Secondly, even assuming that SMBC does intend to publish a separate figure on a future date, it has not provided a reasonable explanation for waiting until that date.
64. At the point at which SMBC withheld this particular information, the payments in question would have been made. Once a payment has been made, its value cannot change – although precisely how that figure is included the annual accounts may do.
65. Unlike an asset valuation, where there is an element of subjective judgement, once a payment has been made, its value has been fixed. The Commissioner sees no reason why the disclosure of a single, fixed, payment would undermine the publication of audited annual accounts – in the same way that SMBC is able to publish its monthly spending data without undermining the audit process.
66. As the Commissioner is satisfied that section 22 does not apply and as no other exemption has been relied upon in respect of this information, the information must now be disclosed

Other matters

67. SMBC has acknowledged that that the case evolved in a confusing fashion with the complainant making several requests through a series of emails for information and clarification of rumour, hearsay and unsubstantiated commentary. However, the Commissioner considers that SMBC contributed to that prolonged process through its poor handling of the request.
68. Public authorities should not be distracted, when dealing with requests for information, with any extraneous "commentary" or other matters that the requester might add to the same correspondence. Instead, they should determine which parts of the correspondence constitute requests for recorded information, then respond to those parts (and only those parts) in accordance with FOIA (or, where applicable, the EIR).
69. If the requester also wishes to pursue other matters such as making a service complaint, seeking a press statement etc, the public authority should separate out those elements of the correspondence and deal with them via whatever procedures it has in place for dealing with such correspondence.
70. Public authorities should also be clear about which elements of the correspondence they are dealing with via which process.
71. It is especially important not to conflate the issues in cases such this, where the requester was likely to challenge elements of any response that was provided.

Right of appeal

72. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk <mailto:GRC@hmcts.gsi.gov.uk>

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

73. 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.
74. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF