



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0070

ON APPEAL FROM:

The Information Commissioner's Decision Notice: FS50739138

Date of Hearing: 15 September 2020

Before

JUDGE ROBERT GOOD

TRIBUNAL MEMBER(S)

MS ANNE CHAFER AND MR MICHAEL JONES

Between

JULIAN SAUNDERS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

SANDWELL METROPOLITAN BOROUGH COUNCIL

Respondent

Subject Matter

Freedom of Information Act 2000 (FOIA)
S30 (Investigations), S31(Law Enforcement), S40(Personal Information) S42(Legal
Professional Privilege)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the tribunal refuses the appeal. The withheld information is not disclosable under Section 31(1)(g) & 31(2)(b), Section 40 and Section 41 of FOIA. It is not in the public interest for this information to be disclosed.

REASONS FOR DECISION

Introduction

1. The appeal concerns the disclosure of information relating to allegations made against Councillor Hackett, which were the subject of an internal Council investigation. The request for information was made on 12 January 2017. This was about three months after the Council investigation had been completed. The decision by the Information Commissioner (ICO) was not made until 13 February 2019. Following the ICO decision, the Council investigation was re-opened in November 2019 and that re-opened investigation is still ongoing at the time of this hearing.
2. The delay in the decision by the ICO was due to Mr Saunders' request that the matter be put on hold because of the possibility of resolving his request with the Council. When that failed, the complaint was continued.
3. There has also been delay in hearing this appeal. It was first listed in September 2019 and adjourned at the request of the Council because new information had been identified, which resulted in the re-opening of the investigation. The appeal was then listed for December but had to be adjourned because of the general election. It was listed for a third time in March, but this date was vacated because of the Covid 19 pandemic.

4. This hearing has been conducted using Cloud Video Platform (CVP). All the participants joined from their homes except for Mr Stevens, Chief Executive of the Council and members of his legal department, who were at the council offices.
5. The council was represented by Mr Robin Hopkins. Mr Saunders represented himself. Mr Stevens was the only witness, who gave oral evidence. Mr Saunders provided a witness statement and made submissions on this, but it was not necessary to ask him questions about his statement. There was no closed session.
6. It was confirmed that it was no longer appropriate to refer to Councillor Hackett as Councillor X in line with the tribunal directions. Mr Saunders has, by mistake, posted on his blog sections of the investigation report which has been withheld. As soon as he realised his mistake, Mr Saunders removed it and sent an apology to the tribunal. The tribunal accepted this.

Factual Background

7. Mr Saunders requested on 12/01/2017 information on the Council investigation into 6 allegations made against Councillor Hackett. He requested the report, the amended report, all documents, statements and correspondence relating to the conduct of the investigation including counsel's opinion, the identity of the investigators, and all documents relating to the decision to produce an amended report.
8. The Council disclosed some information, but the majority was withheld under S.30(1), S.40(2), S.42, S.41 and S.12 FOIA. Mr Saunders complained to the ICO on 07/06/2018. On 13/02/2019 the ICO decided, notwithstanding the Council's failure to comply with the time requirement or to provide advice

and assistance, that the Council was correct in relying on S.30(1)(a)(i) &(ii) & 30(1)(b), s.40(2) and S.42(1). The ICO found that disclosure of third party personal data would be unfair by virtue of S.40(3)(a)(i) and in relation to S.30 and S.42 that the balance of the public interest considerations was in favour of withholding the information. The ICO found that the Council did not correctly apply S.12 and as the information for which the council had claimed exemption under S.41 was covered by other exemptions the ICO did not consider this section.

Issues

1. The ICOs decision considered the exemption covered by S.30 – ‘Investigations and proceedings conducted by public authorities’. The Council are now accepting that the S.30 exemption does not apply to this situation, but that S.31 does apply. S.31 is headed ‘Law enforcement’. At first glance, it would seem that a Council investigation would be covered by S.30. However, that section only applies where the investigation may lead to prosecution. While this remains a theoretical possibility, the Council accepts that this was not the situation here. However, S.31(1)(g) covers the functions of public authorities and S.31(2)(b) describes the investigation in this case.
2. Mr Saunders confirmed in his statement of 23 June 2020 that he wanted the information relating to the first 5 allegation in the report as part of his appeal. There had been a suggestion that he might now be limiting his request to information in respect of the first allegation. However, he confirmed that he was still seeking information on all the allegations which the Council investigated.
3. On 02/07/2019, Mr Saunders made a written submission which was headed ‘Possible ICO BIAS’. The complaint is really against the actions of the Council. What concerned Mr Saunders was that the ICO may have been influenced by

what he believed was a co-ordinated attack on him because of the ICO's lack of response to the correspondence from the Council. The ICO has not attended and Mr Saunders did not seek pursue this as an issue. The tribunal did not identify any documents or letters which indicated that the ICO was doing anything other than applying the provisions of the Act to the request and the Council's response in withholding some information.

4. Mr Saunders did raise the issue of whether the re-opened investigation is a genuine substantive process or whether, in his words, 'it is mythical'. This accusation appeared to arise more from Mr Saunders' frustration at delay rather than a belief that there was no re-opened investigation and the assertion that it had been re-opened was a device to withhold requested information. Mr Stevens for the Council gave clear and compelling evidence that he had taken the decision to re-open the investigation and that it was still ongoing. Mr Saunders did not challenge this evidence. It was clear that there had been a better dialogue between the Council and Mr Saunders, and Mr Saunders acknowledged the steps Mr Stevens had taken to assist him in his request for information.

5. Mr Hopkins, on behalf of the council, stated that the tribunal should first consider the situation at the time of the request, when the investigation had only recently been concluded. That investigation had decided that there should be no recommendation of a referral to the Standards Committee. In Mr Hopkins submission at the time of the request, Councillor Hackett and the others involved had a reasonable expectation that the matter was concluded and the issue closed and on this basis the exemption of S.31(1)(g) & S.31(2)(b), S.40(2) and S.42 had been correctly applied. For the same reason there was limited public interest in disclosure and a greater public interest in maintaining the exemptions.

6. However, he submitted that if the tribunal decided that the exemptions did not apply to this information, the tribunal should use its 'steps' discretion to dismiss the appeal because the investigation has subsequently been re-opened and remains under active consideration.

7. Mr Saunders accepted that the information he was seeking should be redacted to remove information covered by legal professional privilege. The tribunal agrees. S.42 is no longer an issue in this appeal. Mr Saunders agreed that S.31(1)(g) & S.31(2)(b), S.40(2) and S.41 were engaged and wanted the tribunal to consider whether the other exemptions applied and to consider the public interest test. In his submissions Mr Saunders put great emphasis on the public interest in knowing what has taken place and that there was much greater public interest in disclosure than in maintaining the exemption.

Findings, Reason and Conclusions

8. The tribunal is in an unusual position. At the time of the request, the investigation had recently been concluded. Councillor Hackett, the subject of the investigation had been 'exonerated'. This was a description used about the conclusion of the investigation. However, the tribunal find that the investigation, instigated by the Acting Monitoring officer, was deciding whether there was a level of conduct which warranted a referral to the Standards Committee under the Localism Act 2011.

9. The tribunal finds that the investigation was concluded in October 2016 with a decision that a referral was not appropriate. That should have been the end of the investigation. However, when Mr Stevens became the Chief Executive Officer, he decided that the 2016 investigation was inadequate. He requested that the matter be considered by the Standards Committee.

10. On 11/11/2019 the Standards Committee decided to overturn the findings of the earlier investigation and decided that there should be a further investigation into allegation 1. This decision to re-open the investigation was 9 months after the decision of the ICO. The re-opened investigation is still considering the same issue, whether there should be a referral to the Standards Committee. This re-opened investigation is still active and ongoing. It has been delayed by difficulties in taking evidence because of restrictions resulting from the Covid-19 pandemic.
11. The tribunal accept Mr Stevens written evidence which was confirmed in his oral evidence that this re-opened investigation is ongoing. However, it only concerns allegation 1. The other allegations were properly investigated and determined by October 2016. The focus of Mr Saunders correspondence has been in relation to allegation 1. This led the Council to raise the possibility that this appeal was only proceeding in relation to allegation 1. This is not the case. Mr Saunders wishes disclosure of all of the information withheld, except that which has been withheld under S.42, legal professional privilege.
12. In separate proceedings, the council has accepted that it breached the Data Protection Act (DPA) in relation to allegation 1. This is a separate matter. It does not necessarily follow from that admission that Councillor Hackett has breached the DPA. If the re-opened investigation finds that Councillor Hackett is responsible for the breach it also does not follow that, in the particular circumstances, it will result in a referral to the Standards Committee. That issue is still being investigated.
13. Mr Hopkins, in his submission, argued that the starting point for the tribunal has to be the situation when the request for information was made. At that time, the investigation was over, and the decision had been made that there should be no referral to the Standards Committee. The matter was closed. The

tribunal accepts that this is the correct approach. The tribunal looks at the issues afresh, but as they stood when the request was made and responded to.

14. However, in light of subsequent developments, it is necessary to distinguish between the information sought in relation to allegation 1 and the information sought in relation to the other allegations.
15. In respect of allegation 2-5, the investigation was completed. It has not been re-opened, and that investigation found that there was no basis for a referral to the Standards Committee.
16. Although the council did not rely on S.31 in its decision, the tribunal accept that this is the correct exemption to consider. S.30 only applies where criminal proceedings are being considered. Although, it could be argued that any investigation may uncover criminal activity and lead to prosecution, this was not the case in this investigation. Mr Hopkins suggested that it was possible that the investigation into one of the allegations could have been correctly considered under the S.30 exemption. The tribunal finds that in respect of all the matters being investigated the issue was possible improper conduct not possible criminal conduct and the exemption, which applies to the information sought in relations to the investigation and the report, is S.31(1)(g) &S.31(2)(b) and S.41. These are qualified exemptions.
17. These exemption are therefore subject to the public interest test. Mr Saunders has little faith in the council and its operations. In his view, the public interest in exposing council failings is greater that the public interest in having a robust and effective investigation procedure. In Mr Saunders' view it is precisely because the procedure was flawed that it needs to be exposed.

18. The council has withheld witness statements and other evidence used in the investigation, the reports summarising this evidence, and communications between officers of the council in relation to the investigation.
19. The council has a process of investigating complaints against elected members, which is initiated and overseen by the Monitoring Officer. For this process to be robust and effective, it must be able to conduct the investigation in confidence, to allow witnesses to speak freely. If what is said is then published to the world at large, it is likely that in future witnesses will be circumspect in the information they provide. In such a situation, the integrity of these investigations would be compromised.
20. The information collected in order to complete the initial report was given in confidence and there would be an inevitable chilling effect if it were known that information given would then be disclosed to the public at large.
21. The situation changes over time. There is a less compelling argument for exempting disclosure of an investigation report in the past. But this is not the case here. At the time, the tribunal is considering, the report had only recently been made. Disclosure of information so recently given would not be in the public interest because it would inhibit the responses given to such investigations. It is of significant public interest that the council are able to conduct thorough and robust investigations of complaints.
22. On balance the public interest in having a transparent process is outweighed by the public interest in having an effective investigation process. The tribunal finds that the importance of, and the public interest in, having a properly functioning council with an effective investigative procedure is greater than the public interest in seeing the nuts and bolts of that operation.

23. The same considerations do not apply in the same way to the information relating to allegation 1. Mr Saunders' view that there is public interest in a transparent investigation so that the inadequacies of that investigation can be demonstrated is stronger because it has been shown that the first investigation was flawed. This has resulted in the Standards Committee requesting that the investigation be re-opened and re-examined. The process of re-opening is a recognition of the failings of the first investigation. Those failings increase the public interest in disclosure.
24. However, the tribunal accept Mr Hopkins' submission that, in this situation, the tribunal should exercise a steps discretion and not order disclosure of the information in relation to allegation 1 because it is now the subject of an on-going investigation which would be prejudiced if there was disclosure.
25. Because of the tribunal conclusion that the withheld information, covered by S.31 and S.41, should not be disclosed, it is not necessary to consider the effect of S. 40. However, it is the tribunal's view that S.40 would apply to personal data in the withheld information. In light of the conclusion of the tribunal in respect of S.31 it is not necessary to go into more detail in respect of S.40.

R Good

Judge of the First tier Tribunal

Date of Decision: 16/11/2020

Date Promulgated: 18/11/2020