

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 September 2007

Public Authority: Commission for Local Administration in England
(Local Government Ombudsman)
Address: Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant wrote to the Local Government Ombudsman to request information regarding its investigation of a complaint she had previously made against Southend-on-Sea Borough Council. The public authority refused to supply some of the information, relying upon section 44 of the Act which provides for an exemption from the right to know where disclosure is prohibited under any other enactment. The relevant statutory prohibition is section 32(2) of the Local Government Act 1974. The Information Commissioner has considered the complaint and has found that the information was exempt and that the public authority applied section 44 of the Act correctly. However the Commissioner has found that the public authority breached section 17 of the Act by failing to respond to the request within 20 working days.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 28 March 2005 the complainant wrote to the public authority to request any information it held in connection with complaints she had previously made against Southend-on-Sea Borough Council's social services department.
3. On 14 December 2005 the complainant wrote again to the public authority to repeat her request that it provide her with any information it held regarding her complaint against Southend-on-Sea Borough Council ("the Council"). At this point

the complainant indicated that on receiving her earlier request of 28 March an employee of the public authority had rung her to explain that it held very little information at that point as it was still in the process of obtaining information from the Council regarding her complaints. The complainant also asked to be supplied with any information which the public authority may receive in the future, regarding her complaint.

4. The public authority did not respond to the request until 16 March 2006. The public authority referred to the complainant's request as a request for "all documents that we have received from Southend-on-Sea Borough Council about your complaint". The public authority said that the information requested by the complainant formed some of the contents of a complaint file to which section 44 of the Act applied. The public authority explained that the relevant statutory prohibition is section 32(2) of the Local Government Act 1974 and that under this Act it is not permitted to disclose any information obtained in the course of, or for the purposes of, the investigation of a complaint, unless it considers it necessary for the purposes of the investigation.
5. The public authority said that it would release as much of the information which it had received from the council as it reasonably could as it considered that it is helpful for its investigation for the complainant to be fully aware of the information on which it reaches its decision. However, the public authority identified the following information which it had received from the Council and which it was withholding from the complainant.
 - "A log of correspondence with the Director which referred to other individuals by name and did not include any reference to you
 - Details of private telephone numbers and addresses of officers
 - Agenda and minutes of interagency meetings convened by the NHS Trust in November 1998
 - Notes of various telephone calls which do not refer to your son or to you
 - Hand written notes by the Director of Social Services made in November 1998
 - A management record of a phone call in November 1998
 - Comments in internal investigation report relating to the cases in September 2000."
6. The complainant wrote to the public authority on 15 March 2006 to complain about the length of time it had taken to respond to her request. It appears that this letter crossed in the post with the public authority's letter of 16 March 2006.

7. The public authority addressed these complaints in a letter dated 18 April 2006. It acknowledged that it had delayed unreasonably in responding to the complainant's request.
8. On 1 May 2006 the complainant wrote to the public authority to outline her concerns regarding the public authority's response to her request. The complainant also outlined the following specific pieces of information which she believed she was entitled to receive.
 - I. "All of [name redacted] investigation records to date.
 - II. The provisional views of [name redacted] regarding my complaints.
 - III. [name redacted] report which I understand was found in mid March.
 - IV. The other Social Services Internal Inquiry Reports.
 - V. The notes of the inter-agency meetings convened by the NHS Trust in November 1998.
 - VI. All records medical or otherwise regarding my son."
9. The complainant also requested any further information which the public authority may receive in the future regarding her son or her complaints.
10. The public authority responded to the complainant on 7 June 2006 in the form of an internal review. The public authority addressed in turn the specific pieces of information which the complainant believed she was entitled to receive.
11. The public authority said that it was unsure what the complainant meant by "investigation records" but confirmed that [name redacted], the investigator originally allocated to the complaint, had made no written enquiries of the Council. However it said that it would disclose copies of notes of an interview which the investigator conducted with the complainant on 14 December 2004. It said that it did hold further investigation records but that disclosure of this information would not be for the purposes of the investigation and would therefore be exempt from disclosure under section 44 of the Act by virtue of section 32(2) of the Local Government Act 1974.
12. In respect of the request for sight of the investigator's draft provisional view, the public authority explained that although the investigator recalled preparing a draft provisional view this had accidentally been deleted. It also said that even if this had not been destroyed the information would still be exempt under section 44 of the Act.
13. The public authority said that the complainant's request for [name redacted] report was exempt from disclosure under section 44 of the Act.
14. The public authority said that its understanding was that the complainant had already received copies of the Social Services Internal Inquiry reports. However,

- it asked that the complainant provide further details if she was referring to other documents not previously supplied.
15. The public authority said that the “notes of the interagency meetings convened by the NHS Trust in 1998” contained sensitive personal data about third parties and it did not consider that disclosure of such data was justified in the interests of the investigation. The public authority said that it considered this information to be exempt from disclosure under section 44 of the Act.
 16. In respect of the complainant’s request for “all records, medical or otherwise, regarding my son” the public authority explained that the complainant had already received the majority of this information. It said that it had considered the remaining information which had not been provided to the complainant but that it would not be appropriate to disclose these records for the purpose of the investigation. It said that this information was also exempt under section 44 of the Act.
 17. Finally, the public authority said that the complainant could not make a valid request, under the Act, for information that it does not hold at the time of responding to the request. However it did say that it would keep in mind the complainant’s wishes to be kept informed in the event of new information being received.
 18. The complainant wrote to the public authority again on 16 June 2006, providing her comments on the response she had received. The complainant dealt with each part of her request in turn.
 19. In respect of the request for investigation records, the complainant said that she understood that the public authority’s investigator had made no written enquiries of the Council but that she believed that the investigator had arranged to interview the Council’s social services’ staff. The complainant asked whether these interviews ever took place.
 20. The complainant queried whether the document containing the investigator’s provisional view on her complaint could be recovered from a computer’s hard drive even if it had been deleted.
 21. The complainant said that she understood that the public authority intended to write to the Council regarding [name redacted] report and that she would await the outcome of this before referring the matter to the Information Commissioner.
 22. Between the complainant’s letter of 1 May 2006 and the public authority’s response of 7 June 2006, there was some confusion over what information the complainant was referring to in her request for “the other social services Internal Inquiry reports”. In the letter of 16 June 2006 the complainant provided the public authority with a three reference numbers which she said referred to social services internal inquiry reports. She explained that it was these particular reports she was seeking and not the documents previously supplied.

23. The public authority concluded its correspondence with the complainant, regarding her information requests, in a letter dated 13 July 2006. The public authority essentially confirmed its position set out in its previous letter of 7 June 2006. The public authority said that it had searched its files and that it had found no trace of the particular social services investigation reports which the complainant had referred to. It confirmed that its reasons for refusing the other 5 parts of her request still held.

The Investigation

Scope of the case

24. On 26 July 2006 the complainant contacted the Commissioner to complain about the manner in which her request for information had been handled.
25. In reaching his decision the Commissioner has considered the public authority's failure to respond to the complainant's request within 20 working days. The Commissioner has also considered its decision to refuse the complainant's request for information regarding her complaints against the Council, as clarified in her letters of 1 May 2006 and 16 June 2006.
26. The Commissioner recognises that the complainant requested that the public authority provide her with any information it may receive in the future regarding her complaint against the Council. However, a valid request for information is a request for recorded information which a public authority holds at the time that the request is made. Therefore the Commissioner cannot consider this aspect of the complaint.
27. The Commissioner considers the complainant's letters of 1 May 2006 and 16 June 2006 to be refined requests for information. In these letters the complainant sought to clarify the specific pieces of information she required and believed she was entitled to. In reaching his decision on this complaint the Commissioner has considered the public authority's responses to these letters.

Chronology

28. On 16 August 2006 the Commissioner wrote to the public authority to request that it provide him with the following:
- A thorough and complete list of all the information the public authority is withholding from the complaint annotated to show which exemptions apply to each piece of information.
 - A full explanation of why it is appropriate to rely on the exemptions claimed
29. The public authority responded to the Commissioner's letter on 12 September 2006. It said that all the information requested by the complainant falls within the scope of the statutory bar on disclosure set out in section 32(2) of the Local

Government Act 1974. The public authority explained that it is for the Ombudsman and his delegated staff to decide what information it is proper to disclose “for the purposes of the investigation”. It further explained that ‘in doing so, the Ombudsman has regard to a number of factors including the statutory requirement to conduct his investigations “in private” but also the interests of third parties, the relevance of the information requested to the Ombudsman’s investigation and so on’.

30. In responding to the complainant’s requests and correspondence the public authority had made reference to the withheld information containing personal data. In responding to the Commissioner the public authority sought to clarify its position by explaining that it was not applying the exemption provided in section 40 of the Act for any of the information requested. The public authority also asked for an extension of time for it to respond to the Commissioner’s request for an annotated list of the information being withheld from the complainant.
31. On 20 September 2006 the public authority provided the Commissioner with a list of all the information it held regarding the complaint against the Council which had not been disclosed to the complainant, or which she had not otherwise had access to. The public authority explained that in cases with a large number of documents, like this one, it frequently places documents on “document files”. It explained that these files are separate from its investigation files which contain the main correspondence between itself, the Council, the complainant and any other relevant parties. The public authority also provided details of documents contained in its document files which were not disclosed to the complainant in their entirety.

Findings of fact

32. The complaint against the Council concerned the death of the complainant’s son whilst in the care of that council’s social services department.
33. The public authority has said that it had lost the complainant’s initial request of 28 March 2005. However it is clear that this request was received by the public authority as it is referred to in a telephone conversation between the complainant and the investigator on 31 March 2006.

Analysis

34. A full text of the relevant statutes referred to in this section is contained within the legal annex.

Procedural

35. The complainant initially made her request for information on 28 March 2005. The complainant restated her request on 14 December 2005 yet the public authority did not respond to the request until 16 March 2006. As a result the public

authority clearly exceeded the limit of 20 working days required by the Act for responding to a request.

Exemption

36. The Commissioner recognises that section 32(2) of the Local Government Act 1974 acts as a statutory prohibition on the disclosure of information obtained in the course of, or for the purposes of an investigation by the public authority and is satisfied that responding to a freedom of information request is not one of the reasons for disclosure provided for in sub-sections a) – c) of section 32(2). The main issue to be considered as part of this decision is whether the information requested by the complainant was obtained in the course of or for the purposes of the public authority's investigation into the Council.
37. The Commissioner has considered the complainant's refined requests of 1 May and 16 June 2006 as referred to in paragraph 8 and paragraphs 18 to 22 above. Part 3 of the requests was for a report produced by [name redacted]. This is a reference to a report produced by the Council's social services department and passed to the public authority in the course of its investigation of the council. Therefore the Commissioner is satisfied that this information falls under the statutory prohibition. On reviewing parts 5 and 6 of the requests it is clear that these are also requests for information which were received by the public authority in the course of investigating the complaint against the Council. Therefore the Commissioner is satisfied that this information also falls under the statutory prohibition.
38. The complainant also requested copies of the social services internal inquiry reports. As outlined previously, there was some confusion over which internal inquiry reports the complainant was seeking. When the complainant clarified which documents she required the public authority said that it did not hold these documents. The Commissioner has reviewed the list of documents provided by the public authority and is satisfied that the public authority does not hold the social services internal inquiry reports requested by the complainant. However, the Commissioner also wishes to highlight the fact that even if these documents were held by the public authority they would in any event be exempt from disclosure if they had been passed to the public authority in the course of, or for the purposes of its investigation into the complaint against the Council.
39. In responding to the complainant's request for the provisional views of the public authority's investigator it said that [name redacted], the investigator, had drafted a provisional view on her complaint but that it had been accidentally deleted. The Commissioner has investigated this point and is satisfied that the information was not held by the public authority when the complainant made her requests.
40. The Commissioner has also considered the public authority's response to the request for copies of the "investigation records". The public authority responded to this aspect of the complainant's request by stating that the investigator had made no written enquiries of the Council. The complainant said that she accepted this but then queried whether the investigator had conducted any interviews with the Council. The public authority subsequently confirmed that the investigator had conducted interviews with the Council and disclosed the names of Council staff

who were interviewed. It is clear that at this point the complainant was refining this aspect of her request to concentrate on any interviews conducted by the public authority. Therefore the Commissioner has gone on to consider whether any additional information related to any interviews carried out by the public authority, in the course of its investigation, could have been disclosed to the complainant.

41. On reviewing the list of documents supplied to the Commissioner it is clear that the public authority does hold notes of interviews with Council staff. However the Commissioner is of the opinion that such information would be covered by the statutory prohibition. The sets of notes were generated by the public authority itself in the course of investigating the complaint and therefore were not physically obtained; insofar as the information was not passed to the public authority by the council. However it is quite clear that since the withheld information constitutes notes of interviews the information contained within these documents has been obtained by the public authority in the course of or for the purposes of the investigation.
42. Section 44 is an absolute exemption and therefore the Commissioner has not undertaken an assessment of the public interest test.
43. The Commissioner recognises that the public authority has discretion to disclose information obtained in the course of, or for the purposes of an investigation, where it believes that it would be beneficial for the purposes of that investigation. In reaching his decision the Commissioner has not sought to question the public authority's use of its discretion in this regard.

The Decision

44. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The public authority correctly refused to disclose the information under section 44 of the Act

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached section 17 of the Act by failing to issue a notice within 20 working days of receiving the request.

Steps Required

45. The Commissioner requires no steps to be taken.

Other Matters

46. The Commissioner wishes to draw attention to the extreme delay in responding to the complainant's original request. Whilst the Commissioner recognises that the public authority telephoned the complainant after receiving the request; the Commissioner wishes to remind the public authority of the requirement to issue a proper section 17 notice if it intends to refuse a request for information.

Right of Appeal

47. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 4th day of September 2007

Signed

**Marie Anderson
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1 (1) of the Act provides that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 10 of the Act provides 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.”

Section 17 (1) of the Act states that:

“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.”

Section 44 of the Act provides that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Section 32(2) of the Local Government Act 1974 provides that:

“Information obtained by a local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this part of the Act shall not be disclosed except –

- a) for the purposes of the investigation and any report to be made under section 30 or 31 above; or
- b) for the purposes of any proceedings for an offence under the Official Secrets Act 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this part of this Act, by a local Commissioner or by an officer of either Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this part of this Act or for the purposes of an enquiry with a view to the taking of such proceedings, or
- c) for the purposes of any proceedings under section 29(9) above.”