

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 July 2010

Public Authority: Commission for Local Administration in England
(Local Government Ombudsman)

Address: Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant requested information from the Local Government Ombudsman (the "LGO") relating to its investigation of his complaint regarding Hillingdon Homes, a company that manages housing services within the London Borough of Hillingdon. Although the public authority consented to the release of some of the information, it refused to disclose other parts pursuant to section 44 of the Freedom of Information Act 2000 (the "Act"), which provides an exemption to disclosure where it is prohibited by any other enactment, this being section 32(2) of the Local Government Act 1974 in this case. The Commissioner is satisfied that the withheld information is exempt and therefore does not require the LGO to take any further steps in relation to the request. He does, however, find the LGO to have breached section 17(1) of the Act in its handling of the request.

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.

Background

2. The information request that forms the focus of this notice was submitted during the course of an investigation by the Information Commissioner into whether the complainant would be entitled to access documents on the LGO's complaints file under the Data Protection Act 1998 ("DPA"). In line with the Commissioner's guidance, the LGO identified certain material that it considered would not constitute the complainant's personal data and would therefore fall outside the provisions of the DPA. The complainant has subsequently asked that he be provided with this information.

The Request

3. The complainant submitted the following request on 28 February 2009, which was a repeat of an earlier request, dated 6 April 2008, that had been considered by the LGO under the DPA:

"...I am concerned that my case has not been looked into objectively. I therefore request that I am copied any correspondence, notes or files regarding this case or myself, either internally within the confines of the Ombudsman or externally between yourselves and HH [Hillingdon Homes]; this includes notification if any have been deleted."

4. In its correspondence of 16 March 2009, the LGO firstly apologised for not making its data protection and freedom of information position clearer. In reconsidering the request, the LGO agreed to the release of a file note on the complaint file in question. However, the LGO stated that it would not be prepared to disclose any further information.

5. The complainant subsequently appealed the LGO's decision in his correspondence dated 19 March 2009. Referring to the LGO's earlier correspondence of 13 May 2008, which detailed the papers on the complaints file, the complainant went on to ask:

"...I do not believe that my case was investigated objectively by the Local Government Ombudsman, I therefore request under the Freedom of Information Act (FoIA) all internal notes that were collated during your deliberation."

6. Having reviewed the matter in light of the complainant's comments, the authority responded to the request in its letter of 17 April 2009. The LGO disclosed some of the documentation requested but refused to provide "Other notes" which consisted of "pages of mostly handwritten

jottings or notes, each of which analyses information obtained in the course of the investigation." The Ombudsman explained that this information was covered by a statutory bar in the Local Government Act 1974 ("LGA") and was therefore subject to an absolute exemption from disclosure contained in the Freedom of Information Act 2000 (the "Act").

The Investigation

Scope of the case

7. On 3 May 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

"As my claim is a complaint against the Ombudsman in that I have suggested that they did not view my complaint against Hillingdon Homes objectively, I argue that my request is in the public interest, and not to disclose is deliberately obstructing my rights to obtain all the facts/evidence before proceeding forward..."

8. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:

When considering the request, the LGO informed the complainant of a file note dated 28 February 2008 which it considered exempt under the Act, if not the DPA. Having examined the document, the Commissioner has determined that the information would constitute the personal data of the complainant and should be processed under the DPA. The Commissioner has therefore removed the file note from the scope of this notice.

Chronology

9. On 16 October 2009, the Commissioner wrote to the complainant setting out a preliminary assessment of the case. At the conclusion of his correspondence, the Commissioner invited the complainant to confirm that his understanding of the case was accurate should he wish to pursue the matter.

10. The complainant emailed the Commissioner on 17 November 2009 detailing the reasons why he thought the requested information should be disclosed.
11. The Commissioner subsequently telephoned the LGO on 17 December 2009 to request that the withheld information be provided to him. This was duly sent by the LGO later the same day.
12. On 21 December 2009, the complainant requested an update on the Commissioner's investigation. In his email of 11 January 2009, the Commissioner notified the complainant that he was currently examining the withheld information. However, as part of his considerations, the Commissioner stated that the file note of 28 February 2008 (referred to in paragraph 8) was the complainant's own personal data and, consequently, the appropriate legislative instrument would be the DPA and not the Act. The Commissioner therefore dismissed this part of the information from his assessment under the Act.

Analysis

Procedural matters

Section 17 – refusing a request

13. Section 17(1) of the Act requires that, where a public authority believes that any exemption from part II of the Act is engaged, it should issue a notice stating the fact, specify the exemption in question and state why the exemption applies.
14. The Commissioner understands that there has been, perhaps understandably, some confusion over what legislation would apply in what circumstance, be that the Act or the DPA. However, while the LGO stated that it was not prepared to disclose all requested information in its notice of 16 March 2009, it failed to cite the relevant exemption it was relying upon or the reason why the exemption would apply. The Commissioner therefore finds the LGO to have breached section 17(1) in its refusal of the request.

Exemption

Section 44 – prohibitions on disclosure

15. In the first instance, the Commissioner has considered whether the appropriate access regime would be the Environmental Information Regulations 2004 (EIR), as opposed to the Act. This is because the referral of the complaint to the LGO stemmed from the Hillingdon Homes' handling of the contracting of roof repairs. Information thereby arising from this issue may potentially fall under the definition of environmental information set out at regulation 2(1) of the EIR.
16. The withheld notes themselves form part of the LGO's investigation into Hillingdon Homes in respect of alleged failings by that body. Given that this information focuses on administrative actions in relation to the complaint, rather than the environmental impact of the repairs, the information in question is not considered by the Commissioner to be environmental. Therefore the Commissioner has concluded that the Act would apply rather than the EIR and has therefore moved to consider the application of section 44 of the Act to the withheld information.
17. Section 44(1) of the Act provides that information is exempt information if its disclosure (otherwise than under the Act)–
 - (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.
18. Section 32(2) of the LGA (full wording in the legal annex) provides, subject to certain exemptions, none of which apply in this case, that:

“Information obtained by a Local Commissioner [of the LGO], 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.”
19. The Commissioner is satisfied that the 'Other notes' withheld by the LGO consist of information which the LGO either created or was provided with in the course of its investigation into allegations of administrative failure. The Commissioner therefore considers that, as per section 32(2) of the LGA, the information was obtained during the course of, or for the purposes of an investigation.

20. Accordingly, the Commissioner has determined that the information falls within the prohibition on disclosure contained in section 32(2) of the LGA and that, as a consequence, the exemption provided by section 44(1)(a) applies. As section 44 of the Act is an absolute exemption, the Commissioner is not required to consider the public interest in disclosure.

The Decision

21. The Commissioner's decision is that the public authority correctly applied section 44(1)(a) of the Act to the withheld information.
22. However, the Commissioner has also decided that the authority breached section 17(1) in its failure to specify the exemption it was relying on in its refusal notice.

Steps Required

23. The Commissioner requires no steps to be taken.

Right of Appeal

24. 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
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 26th day of July 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

FREEDOM OF INFORMATION ACT 2000

Refusal of a request

17.— 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."

Prohibitions on disclosure.

44. – (1) 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.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

LOCAL GOVERNMENT ACT 1974

32(2) 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 this Act shall not be disclosed except-

(a) for the purposes of the investigation and of any report to be made under section 30 or section 31 above; or

(b) for the purposes of any proceedings for an offence under the Official Secrets Acts 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 inquiry with a view to the taking of such proceedings, or

(c) for the purpose of any proceedings under section 29(9) above, and a Local Commissioner and the officers of his Commission shall not be called upon to give evidence in any proceedings (other than proceedings within paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this Part of this Act.