

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2013

Public Authority: Southwark Council
Address: London
SE1 5LX

Decision (including any steps ordered)

1. The complainant has requested a copy of a report ("the report") prepared by a named officer of Southwark Council ("the council") following representations made by a member of its staff acting as a whistleblower.
2. The Information Commissioner (the Commissioner) decided that the council correctly withheld some information relying on the exemptions in section 42(1) FOIA (legal professional privilege) and section 40(1) FOIA (personal information). The council incorrectly withheld further information relying on the exemption in section 41(1) FOIA (information obtained in confidence). He did not find it necessary to consider the council's application of the section 40(2) exemption.
3. The Commissioner requires the council to disclose the report in full but redacting the information listed in the annex to this decision.
4. The council 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. On 28 November 2011, the complainant wrote to the council and requested information in the following terms:

"Please send me a copy of [named officer's] report [of her investigation into the reorganisation of the council's benefits advice services arising out of whistleblowing representations by the complainant]."

6. The council responded on 16 December 2011. It disclosed the last two paragraphs from the report, numbered 60 and 61, but withheld the remainder relying on the "personal information" and "information received in confidence" exemptions contained in sections 40(1), 40(2) and 41(1) FOIA.
7. On 8 March 2012 following an internal review the council told the complainant that it maintained its position and refused to make further disclosures.

Scope of the case

8. On 14 April 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that he was an employee of the council and had been concerned that, in reorganising its benefits advice services, the council had failed to consider the likely impact on the local community as it was required to do by section 149 of the Equalities Act 2012 (which required the council to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it).
9. The complainant said that he had drawn this omission to the council's attention and it had commissioned an investigation. He said that he was seeking a copy of the investigator's report. He added that he had raised his concerns through the council's whistleblowing policy as it had been the only channel available to him but that the issue was not confidential or personal and deserved to be aired publicly.
10. The council's position changed in some material respects during the course of the Commissioner's investigation and further information was disclosed to the complainant on 11 October 2012. Where there has been change, this notice sets out the Commissioner's determination of the council's final position. His detailed decision is set out in the annex to this notice.
11. The council has relied upon the exemptions at sections 40(1), 40(2), 41(1) and 42(1) FOIA.
12. As regards the detailed application of the section 40 and 41 FOIA exemptions, the council clarified to the Commissioner that its intention

was for the names of individuals to be exempt under section 40(2) and the information they provided to be exempt under section 41(1). It had exempted information provided by the whistleblower under section 40(1) FOIA, an absolute exemption.

13. The information withheld under the section 40(2) FOIA exemption was the names of the people interviewed by the report's author. The complainant told the Commissioner that he was not seeking the names of the officers of the council and partner organisations mentioned in the report and so the Commissioner has not considered the council's redaction of their names.

Reasons for decision

Personal information - section 40(1)

14. Section 40(1) FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

15. Section 40(1) provides an exemption for information that constitutes the personal data of the applicant. The Commissioner found that some of the withheld information is the personal data of the complainant and that the personal information exemption provided by section 40(1) is engaged in respect to that information.
16. The complainant made plain to the Commissioner that he waived any rights of his own to confidentiality relating to the evidence he had provided to the author of the report. However, the complainant's consent to disclosure is not relevant, since this information is exempt under section 40(1) FOIA. This is an absolute exemption which does not require a public interest test to be carried out and the Commissioner decided that exemption had been applied correctly to the information in the report that had been provided by the complainant.

Information provided in confidence – section 41

17. Section 41(1) FOIA provides that:

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and*

- (b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

The traditional test of confidentiality involves determining whether the information was obtained from another person in confidence, and whether its disclosure would constitute an actionable breach of confidence. For the purposes of this exemption, the Commissioner considers that it is appropriate to adopt the test set out in *Coco v A N Clark (Engineers) [1968] FSR 415* that a breach will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).

Was the information obtained from another person?

18. The council told the Commissioner that its intention had been to exempt the information by relying on the section 41(1) FOIA exemption.
19. Guidance notes prepared by the Ministry of Justice indicate that, when the employee is acting in the normal course of employment, information is not usually being 'obtained' by the public authority from the employee:

Section 41 may apply where disclosure would breach a duty of confidence which a public authority owes to an employee in their private capacity (other exemptions may also apply, in particular section 40 – personal information). On the other hand, if the information is disclosed in the course of employment, when an employee is acting on behalf of the public authority and solely in the capacity of employee, there will be no duty of confidentiality for the purposes of section 41.

The Commissioner is not bound to follow this guidance but he found it persuasive on the facts of this matter.

20. The Commissioner saw that some of the information in the report had been provided by the council's **own employees**, other than the whistleblower. That information was about the process of re-engineering the council's benefits advice services in the face of economic pressures then being addressed by the council. He saw that this information had

been collected by the council from its own officers in the normal course of their employment. That information had therefore not been 'obtained' by the council from its own employees in the sense that section 41(1) FOIA requires and the exemption was not engaged in respect of it.

21. Some of the information in the report had been gathered from officers in the council's **partner organisations** who had been negotiating with the council's officers how best to structure their contribution to the new joint arrangements for providing the re-engineered benefits advice services. The Commissioner decided that this information had been shared with the council in the normal course of business. It was effectively part of a negotiation between the council and its partner organisations and so had not been 'obtained' by the council in the sense that application of the section 41(1) FOIA exemption requires. The section 41 exemption was therefore not engaged since an agreement between two parties does not constitute information provided by one of them to the other.
22. Some of the information in the report had been gathered from the **whistleblower** himself. This information was exempt from disclosure under section 40(1) FOIA and the Commissioner did not proceed to consider the application to it of the section 41(1) FOIA exemption.

Legal professional privilege – section 42

23. Section 42(1) FOIA says that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

24. On 28 August 2012, during the course of his investigation, the council told the Commissioner that it wished additionally to rely on the section 42(1) exemption in respect of the information in paragraphs 56-59 of the report.
25. The Commissioner considered whether the information in paragraphs 56-59 of the report attracted the legal advice privilege strand of the legal professional privilege exemption. He saw that the relevant information was: confidential in nature; had been provided by a professional legal adviser to the council; and was given for the dominant purpose of providing legal advice which addressed the issues raised by the whistleblower and which could guide the council in the event of litigation or the consideration of litigation. While litigation was not immediately in prospect at the time of the request, it could not then have been ruled out as a possible future development. The Commissioner decided that the information in paragraphs 56-59

attracted legal advice privilege and that the section 42(1) exemption was therefore engaged.

26. As the section 42(1) exemption is qualified, the Commissioner proceeded to consider the balance of the public interest in respect of the withheld information.
27. The Commissioner saw that factors in favour of disclosure included:
 - the promotion of transparency and accountability by the council;
 - greater public awareness and understanding of the council's decision making process;
 - promoting a free exchange of views and facilitating more effective public participation in decision making.
28. The Commissioner saw that factors in favour of maintaining the exemption included:
 - the very strong public interest in preserving the ability of the council to obtain full and frank advice from its legal advisers to enable it to consider its position in private, something that is fundamental to the administration of justice;
 - at the time of the information request, the issue of an equalities impact assessment and the legal advice relating to it, which remained a live issue to which the information withheld under section 42(1) FOIA was central;
 - disclosure would have prejudiced the council's case in any potential litigation.
29. The Commissioner decided on balance that the factors favouring disclosure in this matter were not sufficient to outweigh the very strong public interest in maintaining confidentiality of communication between the council and its legal adviser. He therefore decided that the balance of the public interest lay in maintaining the exemption.

Other matters

30. Due to an "administrative error" the council took from 22 December 2011 until 8 March 2012 to respond to the complainant's request for an internal review. This was far too long and arose from an oversight for which the council has apologised.

31. As the Commissioner has found that some of the requested information was the complainant's own personal data, he has also considered whether Council has met its obligations under section 7 of the Data Protection Act 1998. The outcome of the Commissioner's consideration of this matter has been sent to the complainant separately.

Right of appeal

32. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.
34. 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

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX

SCHEDULE OF INFORMATION TO BE WITHHELD

The Information Commissioner decided that the report should be disclosed in full apart from the information that the council had correctly withheld for the reasons given:

- paragraph 3 (a) – (e). section 40(2) FOIA, the complainant does not wish to receive this information
- paragraph 7 withhold name at lines 1,2. section 40(2) FOIA, the complainant does not wish to receive this information
- redact names at paragraphs 8, 10, 12 and 14. section 40(2) FOIA, the complainant does not wish to receive this information
- paragraphs 17-20. Section 40(1) FOIA
- paragraph 21, redact names at line 3. section 40(2) FOIA, the complainant does not wish to receive this information
- paragraph 42. Section 40(1) FOIA
- paragraph 45, redact name at line 1. section 40(2) FOIA, the complainant does not wish to receive this information
- paragraph 46 redacting last sentence. Section 40(1) FOIA
- paragraph 48, redact name at line 3. section 40(2) FOIA, the complainant does not wish to receive this information
- paragraph 49 redacting name at line 1. section 40(2) FOIA, the complainant does not wish to receive this information
- paragraphs 54 redact name at line 1. section 40(2) FOIA, the complainant does not wish to receive this information
- paragraphs 56-59 redact in full. Section 42 FOIA.