

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 October 2017

**Public Authority:** Local Government Ombudsman  
**Address:** PO Box 4771  
Coventry  
CV4 0EH

#### Decision (including any steps ordered)

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1. The complainant has requested the Local Government Ombudsman (LGO) to disclose a copy of its determination in a particular case. The LGO refused to disclose the information citing section 44(1)(a) of the FOIA.
2. The Commissioner's decision is that the LGO has correctly applied section 44(1)(a) of the FOIA in this case. She therefore does not require any further action to be taken.

#### Request and response

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3. On 7 January 2017, the complainant wrote to the LGO and requested information in the following terms:  

"I now ask, under the terms of a Freedom of Information inquiry, for a copy of your determination, reference 15 019 051, in the matter of [redacted]."
4. As the complainant received no response, he emailed the LGO again on 1 February 2017.
5. The LGO replied, advising the complainant that it responded to the request on 11 January 2017. It forwarded a further copy to the complainant, which advised that the LGO had refused to disclose the requested information, citing section 44(1)(a) of the FOIA.

6. The complainant requested an internal review on 10 February 2017.
7. The LGO carried out an internal review and notified the complainant of its findings on 28 February 2017. It confirmed that it upheld its application of section 44(1)(a) of the FOIA to the request.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 8 March 2017 to complain about the way his request for information had been handled. Specifically he stated that he disagreed section 44(1)(a) of the FOIA applied. He advised the Commissioner that he is a local resident and wished to hold his local authority, councillors and officers to account and required assurance that due processes are followed and all councillors and officers act with integrity. To enable him to do this he requires access to information on issues that have been referred to the LGO. He referred to the LGO's own website where it states that it publishes all of its decisions in an anonymised format three months after the date of completion. He believes this decision should be published in line with this statement and the LGO's usual process of doing so.
9. The Commissioner considers the scope of her investigation has been to determine whether the LGO is entitled to rely on section 44(1)(a) of the FOIA to refuse to disclose the determination of the specified case, as it would usually appear in an anonymised format on its website three months from completion.
10. The complainant has confirmed that he is not seeking details of the investigation or the determination as posted to both parties to the complaint. Just the version of the determination as it would be published.

### **Reasons for decision**

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11. Section 44 of the FOIA states 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.

12. Section 44 is an absolute exemption, which means that if the information is covered by any of the subsections in section 44 it is exempt from disclosure. It is not subject to the public interest test.
13. The LGO has applied section 44(1)(a), which exempts information where its disclosure is prohibited by other legislation. It argued that under section 32(2) of the Local Government Act 1974 (LGA), the LGO is prohibited from disclosing information which it has obtained from third parties as part of an investigation unless an exemption applies (the prohibition). The prohibition extends to:
  - (a) those parts of documents created by the LGO which set out the third party information; and
  - (b) the generation of information and analysis derived from the third party information (It referred to *Lloyd Purser v the Information Commissioner and the Local Government Ombudsman EA/2010/0188 24 May 2011* paragraph 20.)
14. The LGO advised that as a result, where the LGO has set out its decision on a matter in writing, much of the document will fall within the scope of the prohibition as the background information and the ultimate decision (including any analysis) will likely consist of information provided from third parties or be derived from such information.
15. It further stated that a request for the information under the FOIA is not an exemption to the prohibition. Under section 31B(1) of the LGA, the LGO is exempt from the prohibition *where the LGO considers it appropriate to publish all or part of a report or statement* (the exemption). When considering such disclosure, the LGO is required to take into account the public interest and the interests of the complainant. The LGO advised that the exemption only applies when and if the LGO considers it appropriate to publish such information in the relevant circumstances. If the LGO does not consider that the exemption should be applied in the circumstances, the prohibition remains in place and the prohibition can only be lifted by the LGO. The LGO confirmed that if the LGO's application of the exemption is disputed, the person disputing that application can complain to the LGO and then seek remedy through judicial review. The FOIA does not enable the ICO to apply the exemption in place of the LGO.
16. In conclusion the LGO stated that, in light of the application of the prohibition, and the absence of the application of the exemption (or any other exemption under the LGA), the LGO is entitled to withhold the requested information under section 44(1)(a) of the FOIA. It reminded the Commissioner that the exemption is absolute and so there is no

requirement for the LGO to consider the public interest test under the FOIA.

17. The Commissioner considers section 32(2) of the LGA concerns the “Law of defamation and disclosure of information” and places restrictions on the disclosure of information obtained by a ‘Local Commissioner’ (LGO in this case) in the course of or for the purposes of ‘an investigation’ under Part II of the 1974 Act.
18. The relevant consideration here is whether the Commissioner agrees the requested information (the determination as it would usually be published) falls within the scope of the prohibition; in other words whether the requested information is information obtained by the LGO in the course of or for the purposes of an investigation.
19. Although the determination will have been created by the LGO itself, the Commissioner is satisfied that the requested information falls within the scope of the prohibition. The determination can only have been written following an investigation during which the LGO will have obtained information about the merits of the complaint. The determination will inevitably discuss the information the LGO obtained during its investigation from third parties, the merits of the case and the LGO’s decision.
20. The Commissioner considers the LGO’s reference to section 31B(1) of the LGA (which provides an exemption from the prohibition in section 32(2) of the LGA) is a gateway on which it relies to publish, in the main, anonymised versions of its determinations on its website. It is to the discretion of the LGO in a given case whether it uses the exemption to dis-apply the prohibition and therefore use this gateway. It is not within the Commissioner’s remit to question the use, or not, of the exemption in a particular case. This is a decision for the LGO alone. Therefore for these reasons, if the LGO decides not to use the exemption to the prohibition in a particular case, the prohibition from disclosure under section 44(1)(a) must continue to apply.
21. The Commissioner agrees with the LGO’s statement that if one wishes to challenge the use, or not, of the exemption, this can only be done with the LGO direct or via judicial review. There is no means of challenging this under the FOIA. The FOIA itself cannot provide an exemption from a statutory prohibition. Gateways allow disclosure for specific purposes but FOIA is about general disclosure to the world at large.
22. For the above reasons, the Commissioner has concluded that the requested information is exempt from disclosure under section 44(1)(a) of the FOIA.

## Right of appeal

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23. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

24. 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.
25. 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** .....

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**