

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2019

Public Authority: Sandwell Metropolitan Borough Council
Address: Oldbury
West Midlands
B69 3DE

Decision (including any steps ordered)

1. The complainant requested from Sandwell Metropolitan Borough Council (the Council) information in relation to the suspension and subsequent reinstatement of some of its staff. The Council withheld the information in its entirety under Sections 30(1) and 40(2) of the FOIA.
2. The Commissioner's decision is that the Council has correctly withheld the requested information under Section 30(1)(b) of the FOIA.
3. The Commissioner has also found that the Council had delayed its response to the complainant and has breached Section 10(1) of the FOIA.
4. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

5. On 31 January 2018 the complainant wrote to the Council and requested information in the following terms:

'Today [name redacted] has written to members saying "the suspension of employees in the Cabinet Secretariat was taken by Council Managers on HR advice" and that "the suspensions have been lifted."

The said "Council Managers" can have no presumption of anonymity in respect of such a serious act. Documents identifying lower status employees should be disclosed but with their names suitably redacted.

1. *What offence are the seven employees alleged to have committed?*

2. *How did "Council Managers" become aware of the alleged offence? What evidence did they obtain before taking the extreme measure of suspension?*
3. *Please disclose all documentation with regard to the investigation from the outset to conclusion including all emails, file notes and any other documentation arising in connection with this whole affair including the request for HR advice and the advice given.*
4. *Identify the "Council Managers" involved in this affair and their individual involvement in the same.*
5. *When was the suspension lifted and why? Were all seven employees allowed to return to their positions without sanction? If not, why not?'*
6. The Council responded on 23 March 2013. It stated it was withholding the requested information in its entirety under Sections 30(1)(a) and (b) and 40(2) of the FOIA.
7. On 20 May 2018 the complainant requested an internal review.
8. Following an internal review the Council wrote to the complainant on 10 July 2018. It stated that it was upholding its original decision.

Scope of the case

9. The complainant contacted the Commissioner in April, May and July 2018 to complain about the way his request for information had been handled. In particular, he said he was unhappy with the Council's decision to withhold the entirety of the information he had requested.
10. The scope of the Commissioner's investigation will be to assess whether the Council has properly applied Section 30(1) and/or Section 40(2) of the FOIA.

Reasons for decision

11. The Council has applied both Section 30(1) and Section 40(2) to the requested information. The Commissioner will deal with Section 30(1) first.

Section 30 – investigations and proceedings conducted by public authorities

12. With regard to the application of Section 30 of the FOIA the Council informed the Commissioner that it was specifically relying on subsections (1)(a)(i), (1)(a)(ii) and (1)(b).

13. Section 30(1)(a) of the FOIA states:

'Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it'.

14. Section 30(1)(b) of FOIA states that:

'Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct'.

15. Section 30(1)(b) is a class-based exemption; if information falls within its scope there is no need for it to demonstrate harm or prejudice in order for the exemption to be engaged. However, the public authority must have the power to conduct the investigation **and** the power to institute and conduct any criminal proceedings that result from its investigation. In order for the exemption to be applicable, any information must be held for a specific or particular investigation and not for investigations in general. The exemption can cover investigations which commence with specific criminal proceedings identified even if ultimately they do not result in a prosecution. It can also cover information concerning initial investigations, or vetting processes, to determine whether a full investigation is warranted, as long as the public authority can explain why any full investigation may, in the circumstances, lead to criminal proceedings.

16. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1) of the FOIA whether it relates to a specific ongoing, closed or abandoned investigation.

Is the exemption engaged?

17. The first step to address is whether the requested information falls within the classes specified in section 30(1) of the FOIA.
18. The requested information consists of a file note prepared by a Council officer who carried out an investigation into the matter and a number of suspension letters that the Council issued to relevant persons.
19. The Commissioner asked the Council to clarify the nature of its specific investigation and explain why the requested information would relate to it. She also asked whether the investigation was complete at the time of the request and why the requested information would be required by the Council to complete its investigatory functions set out in Section 30(1)(a) of the FOIA.
20. The Council explained that, under the Employment Rights Act 1998, when allegations about employees were raised, it had a duty to ensure that they were properly investigated by undertaking a thorough investigation. This was to ensure any action taken was in line with current employment legislation. The Council added that failure to follow a fair process and take any such action in relation to an individual would be a potential grounds for a case being brought of unfair/constructive dismissal and a breach of Section 98 Employment Rights Act 1998.
21. In the current case, the Council said an interim fact finding investigation was undertaken by an officer from its audit team to ascertain what had occurred. At this time, the employees in question were suspended to allow the investigation to take place. This investigation could have been used to support a full disciplinary investigation in relation to the employees concerned. The investigation was ceased and the Council decided that a full disciplinary investigation was not required. At this point the individuals' suspensions were lifted and they returned to work. The Council confirmed the investigation was complete at the time of the request. The investigation specifically related to the individuals and their employment and was conducted as part of the employer's disciplinary process.
22. In relation to the application of Section 30(1)(b) of the FOIA, the Council said it had powers to conduct investigations in employment matters. It also said it had powers to investigate under Section 1 of the Localism Act 2011 with the general power of competence and Section 222 Local Government Act 1972 to prosecute in any matter where it was expedient for the protection and promotion of the interests of the residents of the borough. (In the current case the Council said this would have been for interference with the standards regime for the conduct of an elected member.)

23. With regard to any criminal proceedings, the Council stated this matter was ceased. There had been no evidence that the individuals had committed any disciplinary offence. However, it said that had any wrongdoing been proved, depending on the action proved, the Council could have taken criminal proceedings in addition to disciplinary action as outlined above since Section 222 Local Government Act 1972 gave the Council the power to institute and conduct the criminal proceedings.
24. The Commissioner is satisfied that the Council has the power to conduct these investigations and that the requested information falls under Section 30(1)(b) of the FOIA and is exempt from disclosure on that basis. For that reason she has not gone on to consider any further application of Section 30 by the Council.

The public interest test

25. Having established that Section 30 of the FOIA, a qualified exemption, is applicable in this case, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

Public interest arguments in favour of maintaining the exemption

26. The Council accepts there is a public interest in favour of it being open and transparent in relation to its decisions. However, it believes there are times when information collected during an internal investigation should not be placed in the public domain. By disclosing internal investigations, the Council believes this would prejudice any future ones as people would be less willing to provide information if they knew it might later be made public.

Public interest arguments in favour of disclosing the information

27. There is a general public interest in openness and transparency in relation to decisions made and action taken by public authorities.
28. The complainant believes there is a public interest in knowing why the Council and the managers responsible took the action they did, in suspending a number of its employees and then reinstating them. The Council's actions in the matter had been reported in the local media on 31 January¹ and 5 February² 2018.

¹ <https://www.expressandstar.com/news/politics/2018/01/31/secretaries-suspended-over-meeting-leak/>

² <https://www.expressandstar.com/news/local-hubs/sandwell/2018/02/05/sandwell-council--former-boss-astonished-at-four-month-wait-over-bullying-and-sexism-complaint/>

The Commissioner's view

29. The Commissioner has taken into account the general public interest in promoting openness and transparency in relation to a public authority's decision making. Disclosure of the requested information would allow the public to understand why the Council took the action it did and those responsible.
30. The fact that a number of the Council's staff were suspended and subsequently reinstated is in the public domain. However, the reasons why and those responsible are not.
31. The Commissioner accepts there is a public interest in protecting the safe space to allow internal investigations to take place in relation to any matters that may result in criminal proceedings being contemplated at a later date.
32. The Commissioner also accepts that for the investigatory process to be comprehensive and effective it is important that those involved are not inhibited about providing information because of fear that their comments may subsequently be made public via the FOIA.
33. The Commissioner has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. Accordingly, she finds the Council was entitled to withhold the requested information under Section 30(1)(b) of the FOIA.
34. As the Commissioner is satisfied that Section 30(1)(b) is engaged in respect of all of the requested information she has not gone on to consider Section 40(2) of the FOIA.

Section 10 – time for compliance

35. Section 10(1) of the FOIA states 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."

36. In this case the Council did not issue a substantive response to the complainant's request of 31 January 2018 until 23 March 2018. This was in excess of twenty working days. The Council therefore exceeded the statutory timeframe and breached Section 10 of the FOIA.

Right of appeal

37. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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

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