

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 2021

Public Authority: Surrey County Council
Address: Woodhatch Place
11 Cockshot Hill
Reigate
RH2 8EF

Decision (including any steps ordered)

1. The complainant has requested information about Surrey County Council's (SCC) agreement with West Sussex Fire & Rescue Service (WSFRS) to provide its emergency call handling and mobilising function. SCC said that most of the requested information was exempt from disclosure under sections 41 (Information provided in confidence) and 43 (Commercial interests) of the FOIA. It also said that it did not hold some of the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, SCC did not hold some of the requested information. With regard to the information it did hold, she found that SCC was entitled to rely on section 43 of the FOIA to withhold it. The Commissioner also found that SCC breached sections 1 and 10 of the FOIA by failing to respond to the request within the statutory time for compliance.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 21 January 2020, the complainant wrote to SCC and requested information in the following terms:

"In relation to your arrangement to manage call handling and mobilisation for West Sussex Fire & Rescue Service, please provide the following information:

- 1. Copies of any documents (reports, emails, memos etc) relating to the assessment of staffing levels required to deliver that additional service.*
 - 2. Details of the control room training and experience of the people carrying out that assessment, and of the person who approved staffing levels.*
 - 3. Details of the standards, good practice guides, studies and any research material used to inform the assessment process.*
 - 4. Copies of risk assessments relating to the operational impact when staffing is at, or falls below, your determined minimum level.*
 - 5. Copies of risk assessments that include the issue of stress for control room staff.*
 - 6. Copies of reports submitted, since 3 December 2019, by your own staff or by West Sussex Fire & Rescue Service that relate to occurrences that resulted or could have resulted in a delay to the service's attendance at incidents in Surrey or West Sussex.*
 - 7. Details of action taken by Surrey Fire & Rescue Service to address those occurrences.*
 - 8. Copies of the text in agreements with partners, contractors and suppliers that refer to compliance with guidance from the Centre for the Protection of National Infrastructure.*
 - 9. Copies of the text in any agreements with partners, contractors and suppliers referring to the security of, and access to, sensitive data (personal, commercial, security) used in connection with call handling and mobilisation for West Sussex."*
5. SCC responded on 5 March 2020. It said that the information requested at parts (1) - (7) was exempt from disclosure under section 43(2) of the FOIA. It said it did not hold the information specified at part (8) of the request. For part (9), it disclosed information with some redactions made for information which it said was exempt under section 43(2) of the FOIA.
 6. The complainant requested an internal review on 2 April 2020. SCC provided the outcome on 14 May 2020, revising its position slightly. It applied section 43(2) to withhold the information requested at parts (1) - (5) of the request. It said that this information was also exempt from disclosure under section 41 of the FOIA. It said that it did not hold the information specified in parts (6) - (8) of the request. It maintained that it was correct to rely on section 43(2) to withhold some information at part (9) of the request.

Scope of the case

7. The complainant contacted the Commissioner on 30 May 2020 to complain about the way his request for information had been handled. He disagreed with SCC's decision to refuse the request, and with its claim that it did not hold certain information.
8. The analysis below considers whether SCC was entitled to rely on section 43 of the FOIA to withhold the information requested in parts (1) – (5) and (9) of the request. The Commissioner has also considered whether, on the balance of probabilities, SCC holds the information described in points (6) – (8) of the request.
9. In view of her findings, the Commissioner did not proceed to consider SCC's application of section 41 of the FOIA.
10. The Commissioner also considered SCC's compliance with sections 1 (General right of access) and 10 (Time for compliance) of the FOIA

Reasons for decision

Section 43 – commercial interests

11. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
12. The complainant told the Commissioner that he does not agree that SCC's arrangement with WSFRS is a commercial arrangement, and therefore that section 43 does not apply:

"[Name redacted] claims the agreement between the two public bodies is a "commercial arrangement", yet this is not the case. Both public bodies have clearly stated that it is not.

The agreement is made under the Fire & Rescue Services Act 2004, section 16. Although such agreements may see one Fire & Rescue Authority pay another Fire & Rescue Authority for the costs of delivering services on their behalf, this is not a commercial arrangement. There is no commercial competition and profit, which is normal for a commercial arrangement, is not permitted. Payments must only relate to actual costs."

13. On that point, the Commissioner's guidance on section 43¹ defines 'commercial interests' as follows:

*"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. **However, it could also be to cover costs or to simply remain solvent.**"*

14. The Commissioner is therefore satisfied that the exemption has the potential to cover the type of service provision agreement which is the subject of this request.
15. Information may be commercially sensitive, but it does not necessarily follow that it is exempt from disclosure under section 43(2). A public authority must be able to show how and why its disclosure has the potential to prejudice someone's commercial interests. The prejudice can be to the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity).
16. For section 43(2) to be engaged the Commissioner considers that each of the following three criteria must be met:
- The actual harm that the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to commercial interests.
 - The public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Any prejudice that results must also be real, actual or of substance.
 - The level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
17. SCC manages Surrey Fire and Rescue Service and it is the Fire and Rescue Authority for Surrey.
18. Since December 2019, SCC has also overseen 999 calls for the WSFRS². This strategic sharing of resources is permitted under the terms of the Fire and Rescue Services Act 2004.

¹ <https://ico.org.uk/for-organisations/section-43-commercial-interests/>

² <https://www.westsussex.gov.uk/news/new-999-control-room-goes-live/>

19. SCC said that, at the time the request was received, SCC was in the early stages of negotiating a similar shared service agreement with East Sussex Fire and Rescue Service. The withheld information was used by it as a benchmark to assess staffing and wider business requirements in preparation for this proposed new service.
20. SCC argued that its own commercial interests would be likely to be adversely affected if details of the service standards it had agreed with WSFRS were to be released into the public domain:

"...in particular, SCC's access to a level playing field would be compromised if it had to release details of the commercial arrangement it has entered into with WSFRS when it is in active discussions with another FRA [Fire and Rescue Authority] to provide a similar service, when competitors in the public [sic] sector are not subject to the FOI regime.

If SCC had to release details of staffing levels, levels of training and so on into the public domain, this would provide competitors with valuably commercially sensitive information which could then be used to underbid for future contracts, this would be likely to adversely affect SCC's commercial affairs."

21. It is clear that the complainant wants information "relating to" five key areas to do with the staffing of the joint control room:
 - 1) The assessment of staffing levels required to deliver the shared service.
 - 2) The control room training and experience of the people carrying out the assessment referred to at 1), and of the person who approved staffing levels.
 - 3) The standards, good practice guides, studies and any research material used to inform the assessment referred to at 1).
 - 4) Copies of risk assessments relating to the operational impact of staffing at, and below, the determined minimum level.
 - 5) Copies of risk assessments that include the issue of stress for control room staff.
22. The Commissioner has reviewed the withheld information which comprises:
 - the strategic Collaboration and Delegation Agreement between SCC and West Sussex County Council (which manages WSFRS) and its 14 accompanying schedules;

- the operational service specification document;
 - performance standards and monitoring information;
 - standard operating procedures (SOPs) covering ways of working and reduced staffing;
 - an Equality Impact Assessment of the ways of working SOP; and
 - individual stress risk assessment documentation.
23. The information sets out in considerable detail the responsibilities and obligations of SCC in its strategic relationship with WSFRS, together with agreed service standards, staffing requirements, budgetary information, assets and other information relating to the performance of the contract.
24. The Commissioner notes that some of the information SCC has identified as falling within the scope of the request falls outside its scope, as it does not relate in any meaningful way to points (1) – (5) above. Rather, it is contractual information which underpins the arrangement between the parties. As such, she is satisfied that the schedules it supplied to her, marked A, C, D, F, G, H, I, K, L, M and N, fall outside of the scope of the request and they are not considered further in this decision notice.
25. However, regarding the remaining information, she is satisfied that the potential prejudice SCC has described (if the information was disclosed) clearly relates to the interests which the exemption at section 43(2) is designed to protect. The first criterion in paragraph 16 is therefore satisfied.
26. Turning to the second criterion, for the exemption at section 43(2) of the FOIA to be engaged, it is necessary to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties. In demonstrating prejudice, an explicit link needs to be made between specific elements of the withheld information and the specific prejudice that disclosure of these elements would cause.
27. On this point, the Commissioner is satisfied that SCC has demonstrated a causal relationship between the disclosure of information underpinning its agreement with WSFRS, and prejudice to its negotiating position in relation to a similar agreement it was exploring with another fire service. The Commissioner is also satisfied that the prejudice envisaged is real, actual and of substance.
28. SCC has entered into a commercial agreement with WSFRS to carry out certain functions. It would be likely to put SCC at an unfair competitive disadvantage if it had to release information that underpins this

commercial arrangement into the public domain, particularly at a time when a new contract with a third party is still under discussion. Details of agreed staffing levels, service agreements and budgets for an existing contract would undoubtedly undermine SCC's negotiations on the new contract as it would provide the third party with knowledge of SCC's existing service provision and may result in SCC negotiating a less favourable agreement. It may also enable the third party (or any other body in a position to provide such services) to replicate them, using SCC's model. Either of these outcomes would be disadvantageous to SCC in terms of it being able to preserve its own commercial position. It would create an unlevel playing field in the marketplace in which public authorities now participate, so as to improve delivery of essential services, make financial savings and generate income.

29. With regard to the third criterion, the Commissioner is satisfied that the arguments supplied by SCC demonstrate that prejudice "would be likely to" occur. She is satisfied that they show that there is a real and significant risk of prejudice occurring and therefore she finds that the exemption is engaged.

Public interest test

30. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Arguments in favour of disclosing the information

31. The Commissioner understands that the complainant is concerned about staffing levels, and IT issues, relating to the shared control room, and he has submitted requests to clarify if these concerns are justified. He has referred the Commissioner to comments made by the Fire Brigades Union, regarding the merger having "*inflicted unacceptable and unnecessary levels of risk on the public and employees*"³.
32. SCC acknowledged that there is a public interest in disclosing information relating to the expenditure of public money.

Arguments in favour of maintaining the exemption

33. SCC offered the following arguments for maintaining the exemption:

³ <https://www.bbc.co.uk/news/uk-england-sussex-51048463>

"It is the case that public authorities now have to operate in a much more commercial manner, in order to save, or to generate, funds, as funding from Central Government has reduced by 60% in real terms over the last 10 years. Public authorities are looking to work collaboratively with other authorities in order to make efficiency savings and to provide a better service. If SCC were to lose its competitive edge by having to disclose details of ongoing and potential contractual arrangements into the public domain, where its private sector competitors do not, then this would negatively impact on SCC's ability to generate future revenue streams to replace the reduction in funding from Central Government. We submit that this cannot serve the public interest well."

Balance of the public interest arguments

34. The exemption at section 43 is designed to protect commercial interests, and the Commissioner has given due weighting to the public interest in maintaining such protection in this specific case. The central public interest in the exemption being maintained revolves around protecting commercial activity and a 'level playing field' when engaging in negotiations to provide goods and services to third parties.
35. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities regarding their decision-making processes. In particular, there will be a public interest in knowing more about contracts undertaken by public sector bodies to provide strategic services for other public sector bodies. She also notes that there have been some public comments about the effectiveness and safety of the strategic arrangement between SCC and WSFRS. It follows that disclosing the information underpinning the arrangement between SCC and WSFRS would serve this interest.
36. However, the Commissioner is also aware that it is necessary for public authorities, like SCC, to be able to keep certain information about their negotiations confidential, so as not to prejudice their ability to negotiate competitively when tendering to deliver public services. There is a real possibility that SCC could be commercially disadvantaged by the disclosure of the requested information because of how it might be used by competitors to undercut it in the provision of specialist services. The Commissioner recognises that the number of competitors in a position to provide such services is likely to be low. However, that SCC was promoting its services to a second prospective customer demonstrates that there is a market for them, and it follows that other potential services providers, who are possibly also from a fire and rescue background, would be interested in providing the service.
37. The Commissioner considers that the information might also act as a model to a fire and rescue service wanting to refine its own service

provision, which would also be detrimental to SCC, in that it might deprive it of a potential customer.

38. On balance, whilst the Commissioner accepts that disclosure of the withheld information would be likely to promote transparency, she considers that the public interest in disclosure is outweighed by the public interest in ensuring that SCC can protect its ability to participate competitively in a commercial activity and that this is not undermined. That the agreement at the heart of the request involves the delivery of essential public services further strengthens the public interest in protecting the process. She is therefore satisfied that SCC was entitled to rely on section 43(2) of the FOIA to withhold the information requested in respect of parts (1) – (5) and (9) of the request.

Section 1 – general right of access

39. SCC has said that it does not hold the following information:

"6. Copies of reports submitted, since 3 December 2019, by your own staff or by West Sussex Fire & Rescue Service that relate to occurrences that resulted or could have resulted in a delay to the service's attendance at incidents in Surrey or West Sussex.

7. Details of action taken by Surrey Fire & Rescue Service to address those occurrences.

8. Copies of the text in agreements with partners, contractors and suppliers that refer to compliance with guidance from the Centre for the Protection of National Infrastructure."

40. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
41. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

42. Regarding points (6) and (7), the complainant commented as follows:

"[SCC] claims that they do not hold any information on the occurrences that resulted, or could have resulted, in a delay to the service's attendance at incidents in Surrey or West Sussex, or on the actions taken to address them.

The occurrences include a number of problems described as 'teething problems' by a senior West Sussex officer when questioned by Councillors at a meeting of the West Sussex Environment and Communities Scrutiny Committee in January 2020 (https://westsussex.publici.tv/core/portal/webcast_interactive/461034). He also admitted that there "was a period of a weekend shortly after the cut over when some systems went down in Surrey". It is inconceivable that there is no documentation relating to the failures or the actions taken to rectify them.

It should be noted that at that meeting County Councillors also voiced concern that they had not been given any information about the performance indicators included in the section 16 collaboration agreement, even though Surrey had been running the service for West Sussex for over a month. That Councillors had not seen the agreement, made on their behalf, raises even more public concern about inadequate transparency and accountability with this arrangement. It is difficult to avoid the thought that there is a concerted attempt to cover up serious failings."

43. Regarding the information specified in point (8), the complainant stated:

"[SCC] misrepresents the information requested by suggesting I asked if consideration was given to the guidance issued by the Centre for the Protection of National Infrastructure (CPNI). My request was for copies of the text in agreements with partners, contractors and suppliers that refer to compliance with guidance from the Centre for the Protection of National Infrastructure. It is unclear from the response if Surrey failed to include any reference to CPNI guidance in agreements, or if they simply wish to avoid disclosing the relevant text. This should be clarified."

SCC's position

44. The Commissioner asked SCC a series of detailed questions about its reasons for believing that it did not hold the requested information, including an account of the searches that it had conducted and whether the information may once have been held and subsequently deleted. She also referred SCC to the complainant's specific concerns, reproduced above.

45. With regard to parts (6) and (7) of the request, SCC explained that any reports of incidents affecting service provision would be logged on an electronic feedback system. Thus, if it did hold any such reports, or information about any action taken in response to any reports, it would be located by searching the feedback system. A thorough search had been conducted of the feedback system and no incidents or occurrences falling within the period covered by the request had been logged on it. It had concluded from this that it did not hold the requested information.
46. The Commissioner asked SCC whether the data could have been held and subsequently deleted. SCC said that its retention schedule requires data of this type to be held for the year of capture and an additional two years, meaning that if it had ever been held, it would not yet have been deleted.
47. SCC noted that the specific concerns that the complainant had raised related to comments made by a West Sussex fire officer, speaking at a West Sussex Council meeting. It said:

"This is a reference to a West Sussex Committee and there may be information held by West Sussex on this point but not by Surrey Fire & Rescue."
48. With regard to part (8) of the request, SCC's reason for believing that it did not hold the information described was because it had not been required as part of the project. The instructing officer had confirmed that the inclusion of such text was not a mandatory requirement and so it was not included, or referred to, in the agreements reached with partners, contractors and suppliers.

The Commissioner's conclusion

49. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 40 and 41, above, the Commissioner is required to make a finding on the balance of probabilities.
50. The Commissioner would also wish to make it clear that when dealing with a complaint of this nature, it is not her role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Her remit concerns only the disclosure of recorded information, not what a public authority chooses to record for its own business purposes.
51. The Commissioner recognises that the requested information is clearly of interest to the complainant. She acknowledges that he has concerns

around the safety of the shared control room arrangement, and he considers that SCC should hold information about incidents he believes have occurred.

52. However, having considered SCC's response, and on the evidence provided to her, including SCC's knowledge of its electronic feedback system, the Commissioner is satisfied that SCC conducted adequate searches that were capable of identifying any information falling within the scope of parts (6) and (7) of the request, if it was held. Regarding part (8), SCC was able to give a clear explanation for why the requested text was not included in the agreements and the Commissioner is satisfied that it is implicit that the information is not held.
53. Taking all the above into account, the Commissioner is satisfied that, on the balance of probabilities, SCC does not hold the information described in parts (6), (7) and (8) of the request and that it has complied with its duty under section 1(1) of the FOIA in respect of them.

Section 1 – general right of access

Section 10 - time for compliance

54. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
55. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
56. The complainant submitted his request for information on 21 January 2020 and SCC responded on 5 March 2020, 32 working days later.
57. SCC therefore breached sections 1(1) and 10(1) by failing to respond to the request within 20 working days.
58. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"⁴ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

through targeting systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁵.

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

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

60. 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.

61. 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 Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF