

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 August 2021

Public Authority: South Cambridgeshire District Council

Address: South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge
CB3 6EA

Decision (including any steps ordered)

1. The complainant has requested information about enforcement action in relation to a breach of planning control. The Council supplied some information but withheld the remainder, citing the exemption in section 30(1)(b) of the FOIA – (investigations and proceedings).
2. The Commissioner's decision is that South Cambridgeshire District Council has correctly engaged section 30(1)(b) of the FOIA and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner does not therefore require the council to take any steps.

Request and response

3. On 1 May 2020, the complainant wrote to South Cambridgeshire District Council and requested information in the following terms:
 - "(i) The document(s) recording the decision to proceed with the prosecution, the reasons for the decision, the date of the decision and the identity of the officer who made the decision.*
 - (ii) All correspondence (including emails) between South Cambridgeshire, Huntingdonshire District Council and East Cambridgeshire District Council concerning the decision to prosecute.*
 - (iii) All records of the consideration given, if any, to alternative enforcement action.*
 - (iv) All records of consideration of the Proceeds of Crime Act ('POCA') as part of the decision to prosecute.*
 - (v) The "March 2006 Planning Enforcement Manual Summary of Policy and Procedures" referred to in an email from [name redacted] QC, on behalf of South Cambridgeshire District Council, to the Court [time and date redacted]."*
4. On 5 June 2020 the Council responded. It supplied the information for (v) but withheld the remainder citing section 42 (legal professional privilege) for questions (i), (iii) and (iv), and section 30 (investigations and proceedings) for question (ii).
5. The complainant requested an internal review on 25 June 2020. The Council responded on 9 July 2020, continuing to withhold the information, but switching its reliance from section 42 to section 30(2)(a)(iii).

Scope of the case

6. The complainant contacted the Commissioner on 14 September 2020 to complain about the way his request for information had been handled, objecting to the use of 30(2)(a)(iii).

7. During the course of the Commissioner's investigation, the Council switched its reliance from section 30(2)(a)(iii) to section 30(1)(b) – power to investigate offences and conduct proceedings. The case therefore considers whether the Council is entitled to rely on section 30(1)(b) to withhold the information.

Reasons for decision

8. Section 30(1)(b) of FOIA states that

"(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose 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"

9. Section 30 is a class-based exemption. This means that if the information falls within the section definition it is engaged; there is no need for any prejudice to be demonstrated. However, if the exemption is engaged, it is then subject to the public interest test set out in section 2 of the Act.
10. 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.
11. The public authority must have the power to conduct the investigation concerned and it must also have the power to institute and conduct any criminal proceedings that result from its investigation.
12. 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.

13. The relevant tests for the exemption applying in this case can therefore be shortened to:

- Was the withheld information held by the council for the purposes of conducting an investigation?
- Could the investigation have led to *criminal* proceedings being undertaken?
- Does the council did have relevant powers to conduct those proceedings?

The background to the case

14. For context, the complainant's request relates to a case regarding the enforcement of planning regulations, and the withheld information concerns the decision to prosecute by the council.

15. The complainant acts on behalf of individuals and their company who have been prosecuted by the council for the unlawful erection of advertising hoardings. In addition to the prosecution, the council obtained restraining orders on the defendant's assets under the Proceeds of Crime Act 2002 (POCA).

Is the exemption engaged?

16. At the time the information was obtained/created, the council maintains that 30(1)(b) applied as the information was held for the purposes of the council's power to conduct investigations under sections 222 and 224 of the Local Government Act. Section 222 gives the council the power to prosecute or defend legal proceedings in general, and section 224 the power to enforce and issue proceedings for unlawful advertising.

17. The withheld information includes contextual information surrounding the decision to prosecute, not simply the decision itself.

18. Applying the tests set out in paragraph 13 therefore:

- The council hold the information as part of an investigation which it carried out.
- The investigation did have the potential (and in fact did) lead to criminal proceedings being undertaken.
- Under section 222 and 224 of the Local Government Act, the council did have the relevant powers to conduct the proceedings.

19. The Commissioner is therefore satisfied that the withheld information falls within section 30(1)(b).

The public interest test

20. Having determined that the exemption is engaged, the Commissioner now turns to considering the public interest test. The test, set out in section 2(1)(b) of the FOI Act, is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest in the disclosure of the information

21. The council accepts that there is a general public interest in creating greater transparency surrounding the council's investigatory processes, and in greater accountability in its decision-making. A disclosure of the requested information would provide evidence of its working practices to the public and raise public confidence that its investigations are carried out appropriately.
22. The complainant considers that there may have been a breach of the council's constitution. He considers that there may have been a failure to consult and document the decision to prosecute, which is required by it. He argues that the withheld information would confirm whether this is the case or not.

The public interest in the exemption being maintained

23. The council has informed the Commissioner that the withheld information is contained within of a bundle of documents that was subject to a disclosure hearing held in a Magistrates Court on 10 March 2020 relating to the prosecution case. A District Judge refused the application for disclosure. The council noted that the complainant made their FOI request to the council for the same information shortly after this decision.
24. The council clarified that in the disclosure hearing the withheld information was reviewed by both an independent reviewing solicitor and Junior Counsel for the council. Their decision was that the information was not relevant to the case at hand as it did not assist the defendant's case nor undermine the council's defence arguments. The council clarified that the information therefore forms part of the 'unused material' referred to in the court's order. The decision of 10 March 2020 notes that the defendants did not take issue with this decision at the time. Crucially, therefore, the Judge did not actively consider the disclosure of the withheld information as it was side-lined and not questioned further by the defendants' representatives.

25. As regards the ultimate decision of the court, it decided that there was no reasonable cause to believe that any further material sought by the defence, if it existed at all, would meet the test for disclosure. It therefore refused the application.
26. The council considers that any relevance to the private interests of those involved in the proceedings has been litigated in detail with a judge ordering that no further disclosure was required. This order preceded the request for information. It also confirmed that the legal cases arising from the prosecution were ongoing at the time of the request for information.
27. The council further argued that allowing disclosure of the withheld information (the unused material in the disclosure hearing) would be to seek disclosure of this information through the 'back door' using the FOIA, and that this may prejudice proceedings, as well as undermining the judicial process. It argued that if the defendant disputed the judge's order, they should have appealed rather than use the FOIA as a way to override the judge's decision.
28. The council further explained that the public has access to the policies that informed the decision to prosecute as it is set out in the Code of Crown Prosecutors, which is publicly available. However, the information sought by the complainant in this case is case specific and not in the general public domain; some has been disclosed but only to relevant parties to ensure a fair trial.
29. The council also argues that the specific decision surrounding the decision to prosecute and the considerations surrounding the application of the POCA should not be disclosed to the public at large as it may prevent effective enforcement of this and future cases, and act against the public good of pursuing law breakers. At the time of the request, the case was awaiting hearing in the Magistrate's Court.

The Commissioner's Analysis

30. The Commissioner accepts that there is a strong public interest in the council demonstrating that its own constitution has been followed, particularly where it impacts significantly on the rights and freedoms of others. There is also a strong public interest in demonstrating that its enforcement and prosecution actions have been carried out fairly and appropriately. That is, however, also a function of the Courts.
31. Disclosing details of actions such as this raises confidence in the council's handling of laws which it is designated to enforce and informs the public as to how it goes about that function.

32. Although the FOIA is motive and applicant blind, the council can take into account that a disclosure to the entire world (as disclosures under the Act are considered to be), would include the complainant and his clients.
33. The Commissioner accepts the council's argument that the request relates to the private interests of the defendant. The private interests of one party will carry less weight than information which is more widely in the public interest.
34. The Judge's decision was based on the defence not taking issue with the information being excluded following the independent review. The information was therefore considered to the extent that the independent reviewer's opinion was that it was irrelevant to the arguments at hand, and as this was not questioned further at the time the court did not consider it further for disclosure. The Judge in the disclosure hearing took into account both the reviewer's opinion, and the fact that this was not questioned by the defendant, and decided that the information was not relevant.
35. The Court's decision was ultimately that the information which needed to be disclosed for the purposes of the case had already been disclosed. The hearing took into account the abuse of process arguments raised by the defendants, but the Judge decided that further information should not be disclosed.
36. The Commissioner considers that although the test for disclosure at the hearing was different to that of the public interest under FOIA, there is deep-seated and compelling public interest in upholding judicial processes and decisions.
37. As the court specifically reviewed and re-reviewed the information with a view to potentially ordering disclosure but decided against this on the basis it was not relevant to the arguments submitted, the Commissioner considers that the judge's ruling to refuse further disclosure of the information must take precedence over the complainant's private interests, and the wider public interest in disclosure which she has identified.
38. Although the Commissioner recognises that the judge may not have specifically considered the particular information due to the acceptance of the defendants that it was not relevant to their case, she considers that the place and time to question that decision was to the court at the time in question.

39. The Commissioner places a very strong weight on the protection of the ability of the court to manage disclosure during the course of proceedings in order that the parties are provided with a level playing field. She cannot be fully aware of all of the facts of cases which are ongoing, and therefore the body best placed to make decisions over the disclosure of information would be the court. It will have the benefit of oversight over the circumstances surrounding the proceedings as a whole, and is the body which is tasked with the management of such proceedings, not the Commissioner.
40. Crucially, the court will have oversight as to how a disclosure might affect the balance between the parties during the proceedings. If a disclosure were to take place under the FOI Act, that oversight would not be available, and an unjustified disclosure by the council risks a significant weakening of the court's oversight, and the chances of the council being able to present the case on a fair and level playing field. This would prejudice the ability of the council to bring and present its case before the court.
41. The Commissioner therefore concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.
42. The Commissioner's decision is therefore that the council was correct to withhold the information on the basis that the exemption in section 30(1)(b) applied.

Right of appeal

43. 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

44. 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.
45. 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

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF