

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2023

Public Authority: London Borough of Bexley
Address: Civic Offices
2 Watling Street
Bexleyheath
DA6 7AT

Decision (including any steps ordered)

1. The complainant has requested from London Borough of Bexley ("LBB") a copy of the Monitoring Officer's response to the Code of Conduct complaint made against a named councillor.
2. The Commissioner's decision is that LBB is not entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny it holds any of the requested information.
3. The Commissioner requires LBB to take the following steps to comply with the legislation;
 - Confirm or deny whether it holds any information within the scope of the request.
 - If information is held, either disclose it or issue a refusal notice.
4. LBB 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 23 May 2023, the complainant wrote to LBB and requested information in the following terms:

"Can you please share the Monitoring Officer's (full) response to the Code of Conduct complaint recently made against Councillor (Name redacted), after his "Can we send her back and get our money back?" comment regarding Nazanin Zaghari-Ratcliffe. (The alleged offence is a matter of public record, so there is presumably no breach of privacy)."

6. LBB responded on 1 June 2023. It refused to confirm or deny that any information was held and relied on section 40(5B) in order to do so. It also noted that

"Any information held by the Monitoring Officer concerning Councillor complaints is not intended for wider disclosure. It would only be considered for publication once an investigation had been concluded and findings made about an allegation by the Council's Code of Conduct Committee."

7. Following an internal review LBB wrote to the complainant on 4 July 2023. It stated that

"A formal investigation report was not referred to the Code of Conduct Committee. As such **the Code of Conduct Assessment was not publicised.**" [emphasis added]

Scope of the case

8. The complainant contacted the Commissioner on 4 July 2023 to complain about the way his request for information had been handled. His grounds for complaint were:

"A local councillor made an allegedly racist public comment, widely reported in the media, and was complained about to the borough's Monitoring Officer. The MO decided not to refer the councillor to Code of Conduct committee. I point out that the circumstance of the case are public knowledge – but the MO's judgement is a matter of public interest, especially when there are concerns about the MO "protecting" a councillor from the local ruling party."

9. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5B) of FOIA.

Reasons for decision

Section 40(5B) – Personal data

10. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the requested information – this is referred to as the duty to confirm or deny.
11. However, section 40(5B)¹ of FOIA provides that the duty to confirm or deny whether the authority holds the information does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK GDPR (UK General Data Protection Regulations).
12. The issue that the Commissioner has to consider is not whether any information should be disclosed (if in fact any is held), but whether LBB is entitled to refuse to confirm nor deny whether it actually holds any information.
13. In its responses to the complainant, LBB stated:

“Care is taken in the complaint process to maintain confidentiality. Councillors and complainants have no reasonable expectation that their details will be disclosed to the world-at-large and complainants have a right and legitimate expectation to have their personal information kept private and confidential when they make a complaint in accordance with data protection principles.”
14. In its responses to both the complainant and the Commissioner LBB stated that

“Complaints under the Council’s Members’ Code of Conduct are dealt with under the Council’s arrangements for dealing with complaints which is published on the Council’s website.”
15. The Commissioner notes that the LBB website lists all anonymised complaints made against councillors under its Code of Conduct and summarises how they were handled.² Details of the anonymised complaints on this subject matter were grouped together and published on 10 October 2022. The entry in the log indicates that an “initial assessment” of the complaint had been carried out, but that it was

¹ [Neither confirm nor deny in relation to personal data \(section 40\(5\) and regulation 13\(5\)\) \(ico.org.uk\)](#)

² <https://www.bexley.gov.uk/about-council/democracy-and-elections/councillors-and-wards/members-code-conduct>
<https://democracy.bexley.gov.uk/ieListDocuments.aspx?CIId=1728&MIId=29743&Ver=4>

informally resolved.

<https://democracy.bexley.gov.uk/documents/g29743/Public%20reports%20pack%2028th-Mar-2023%2019.30%20Members%20Code%20of%20Conduct%20Committee.pdf?T=10>

16. The LBB Council leader spoke at a public council meeting and was quoted in a press article³ as stating

“the remarks **went through a process determined by the Monitoring Officer**. The result, as you know, did not say it was a racist comment. The matter has been resolved and we’re moving on from that.” [emphasis added]

17. Given the above, the Commissioner fails to see how LBB has determined that it can rely on section 40(5B) of FOIA to neither confirm or deny that it holds the requested information. The leader of the council is the most senior elected official and, when acting in that capacity (as she clearly would be in a public council meeting), her words represent an official statement from LBB.
18. If LBB did hold information, that information would be the councillor’s personal information and it does not appear to be in the public domain. But when considering section 40(5B), the focus is not on the nature of any information that might (or might not) be held, but on the effect of confirming or denying that the information is held in the first place.
19. The Commissioner has highlighted above several examples of where LBB has confirmed that several code of conduct complaints were received in relation to the councillor in question on this matter and that the Monitoring Officer’s carried out some form of assessment of those complaints. The evidence in the public domain indicates that LBB would hold at least some information that would fall within the scope of the request (though it is not clear what that information contains). It is difficult to see what more would be revealed about the Councillor, that is not already in the public domain, if LBB were to confirm or deny that some information was held.

³ [Councillor reinstated following controversial “send her back” tweet over Nazanin Zaghari-Ratcliffe – South London News \(londonnewsonline.co.uk\)](#)

20. Revealing that information is held would not reveal anything about the complainant because the complaints are anonymised. Section 40(5B) of FOIA does not therefore apply.
21. As the Commissioner has decided that LBB has failed to demonstrate that the exemption at section 40(5B) of FOIA applies, it must now confirm or deny whether information is held.

Right of appeal

22. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

23. 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.
24. 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

Roger Cawthorne
Team Manager – FOI Complaints
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