

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2024

Public Authority: Sandwell Metropolitan Borough Council
Address: PO Box 2374
Oldbury
B69 3DE

Decision (including any steps ordered)

1. The complainant has requested information about a civil litigation case instituted by a member of staff, against a third party, for which Sandwell Metropolitan Borough Council (SMBC) met the costs. SMBC disclosed some information. It said that the withheld information, a letter of complaint, was exempt under sections 40 (Personal information) and 42 (Legal Professional Privilege) of FOIA. It said it did not hold a copy of a legal opinion independently commissioned by external auditors.
2. The Commissioner's decision is that section 40(2) of FOIA was applied correctly to withhold the letter and that, on the balance of probabilities, SMBC does not hold the legal opinion provided to the external auditors.
3. The Commissioner does not require further steps as a result of this decision.

Background

4. The request relates to legal action that SMBC's Director of Public Health (DPH) took against an individual, alleging harassment.
5. SMBC had previously taken legal advice, which confirmed that it could indemnify individual employees for the costs of proceedings they may bring in connection to their roles as officers, excluding defamation claims. The Council agreed to indemnify the DPH against legal costs in this case.

6. The ensuing legal claim was struck out as having no reasonable prospects of success and the DPH's costs of around £96,000 (plus VAT) were met by SMBC. An external auditor's Value for Money Governance Review, by Grant Thornton, found that SMBC did have the power to indemnify the DPH in this case, but that, in future, legal advice should be obtained on a case by case basis. It also noted:

"The Council officers involved were surprised at the outcome of the case based on the legal advice received and management have written to the barrister expressing disappointment".¹

Request and response

7. On 22 August 2023, the complainant wrote to SMBC about the litigation claim and requested information in the following terms:

"Further to earlier FOI requests in this matter further information has been placed in the public domain by SMBC.

1. SMBC states it wrote to "the barrister" expressing disappointment concerning the outcome of the case. It is not clear which barrister you are referring to. Please clarify whether you mean [name redacted] or [name redacted] (both QC's at the material time and now KC's). Clearly any letter of complaint was not prepared for the purpose of litigation or to seek legal advice and so is not subject to legal professional privilege. Accordingly, please disclose the letter.

2. Grant Thornton failed to intervene in the litigation and has attempted to exonerate themselves. In particular they have secured an allegedly "independent" opinion from Bates Wells, Solicitors concerning the funding. Please confirm whether Grant Thornton has charged SMBC (i.e. the taxpayer) for (a) its chargeable time for instructing Bates Wells, and (b) the actual costs of the Bates Wells "report". If Grant Thornton disclosed the Bates Wells "report" to you, please disclose it."

8. SMBC responded on 19 September 2023. For point (1) of the request, it confirmed the identity of the barrister. It refused to disclose the letter, citing section 40(2) (Personal information) of FOIA.

¹<https://sandwell.moderngov.co.uk/documents/s12515/Appendix%2525201%252520-%252520Sandwell%252520MBC%252520Governance%252520Review.pdf>

9. For point (2), it said that:
 - a) the Council was charged through the Public Sector Audit Appointments (PSAA) contract; and
 - b) it did not hold the actual costs of the Bates Wells report. It also said it does not hold a copy of the Bates Wells report.
10. The complainant requested an internal review on 26 September 2023. He challenged the refusal to disclose the letter and SMBC's claim that it did not hold the Bates Wells report.
11. SMBC provided the internal review on 20 October 2023. It maintained that the letter was exempt under section 40(2) and that it would not be possible to disclose a redacted version. It also introduced an additional exemption: section 42(1) (Legal professional privilege). It maintained that it did not hold the Bates Wells report.

Scope of the case

12. The complainant contacted the Commissioner on 27 October 2023 to complain about the way his request for information had been handled. He disagreed with SMBC's refusal to disclose the letter and its claim that it did not hold the Bates Wells report.
13. The analysis below considers whether SMBC was entitled to apply sections 40(2) and 42(1) of FOIA to refuse to disclose the letter referred to in point (1) and whether, on the balance of probabilities, it holds a copy of the Bates Wells report.

Reasons for decision

Section 40(2) – Personal information

14. The Commissioner has considered whether SMBC was entitled to apply section 40(2) of FOIA to withhold the letter referred to in point (1) of the request.
15. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. In this case, having viewed the letter, the Commissioner is satisfied that it comprises personal data. This is because it is about a legal claim

brought by an individual, who is both named and discussed in the letter. Furthermore, the barrister is also named and discussed in the letter. In respect of both, this is information which relates to them, personally and in some detail, and they are identifiable.

17. The Commissioner considers the letter in its entirety to be the personal data of both parties. He does not consider it would be possible to disclose the letters in redacted form because both parties would remain identifiable.
18. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
19. In order to be lawful, one of the lawful bases listed in Article 6(1) of the General Data Protection Regulation (the UK GDPR) must apply to the processing. It must also be generally lawful.
20. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is some of the information special category data?

21. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
22. Having viewed the withheld information, the Commissioner finds that it does include special category data. This is because some of the information concerns an identifiable individual's health.
23. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
24. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
25. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to an FOIA request or that they have deliberately made this data public.

26. As none of the conditions required for processing special category data are satisfied, there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt from disclosure under section 40(2) of FOIA.

Other personal data

27. To the extent that the remaining information is not special category data, the Commissioner has considered whether the other provisions of section 40(2) provide grounds for exempting it from disclosure.

Lawful processing: Article 6(1)(f) of the UK GDPR

28. As set out above, the information may only be disclosed if to do so would be lawful, fair and transparent.
29. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
30. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

31. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
32. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

33. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The request concerns the reasons for SMBC's apparent disappointment with the litigation claim outcome. The complainant appears to consider that the decision to grant the indemnity was unlawful. Bearing in mind that the costs were met from the public purse, the Commissioner considers the complainant is pursuing a legitimate interest with the request.

Is disclosure necessary?

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The letter would reveal precise details of SMBC's 'disappointment' with the outcome of the claim, which, as far as the Commissioner can

ascertain, is information which is not in the public domain. The Commissioner is therefore satisfied that disclosure of the requested information is necessary to meet the legitimate interest identified above.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

37. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
38. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the data subjects expressed concern regarding the disclosure; and
 - the reasonable expectations of the data subjects.
39. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
41. SMBC has explained that both data subjects had the legitimate expectation that information in the letter would not be disclosed to the world at large in response to an FOIA request. It said that the information in the letter was confidential, not in the public domain and much of it was covered by legal professional privilege.
42. It confirmed that one party had refused to give consent to the disclosure, and it provided arguments as to how they would be affected if the information was disclosed without their consent. It said the other party had not been asked, as it was not considered appropriate.
43. SMBC explained that disclosure would be intrusive and cause both parties harm (both personally and professionally) and distress. It gave particular details for each party. The Commissioner is unable to

reproduce its arguments in this decision notice, as to do so would undermine its reliance on the exemption being cited.

44. The Commissioner considers that the legitimate interest in disclosure was, to some extent, satisfied by SMBC's confirmation that a letter had been sent expressing the Council's dissatisfaction with the outcome of the proceedings. As regards the complainant's belief it was unlawful, he notes that Grant Thornton's Value for Money Governance Review concluded that SMBC did have the power to indemnify the DPH in this case. On this basis, he finds that disclosure of the letter itself, which contains personal, sensitive and confidential information about both data subjects, would be disproportionate and not necessary to cover this point.
45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
46. Therefore, SMBC was entitled to apply section 40(2) of FOIA to refuse to disclose the remainder of the personal data which was not special category data.
47. In view of this decision, the Commissioner has not found it necessary to consider SMBC's application of section 42(1) of FOIA to the same information.

Section 1 – Whether information is held

48. The complainant asked for the Bates Wells 'report' provided to Grant Thornton. SMBC's position is that it does not hold this information.
49. In cases where there is some dispute over whether a public authority does or does not hold the information that has been requested, 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 the information specified in the request. In doing so, he will take into account any specific reasons as to why it is likely – or unlikely – that the information is held.
50. SMBC explained that Grant Thornton are the external auditors that were appointed by the PSAA³ to carry out a value for money audit of SMBC.

³ <https://www.psa.co.uk/>

Bates Wells were commissioned independently by Grant Thornton to provide them with legal advice, as part of that audit. SMBC said that it did not hold a copy of a report or any legal advice provided by Bates Wells. There was no business purpose, or statutory requirement, for it to hold a copy of the Bates Wells report. Grant Thornton had confirmed that they had not shared a copy of the information with SMBC.

51. The Commissioner notes that the advice was commissioned by Grant Thornton for their own use. This was a transaction between Bates Wells and Grant Thornton, for the purposes of Grant Thornton conducting an audit, for which it was appointed by the PSAA. Furthermore, Grant Thornton have stated that they did not pass the report on to SMBC.
52. Having considered SMBC's submissions, the Commissioner is satisfied that, on the balance of probabilities, Grant Thornton did not provide it with a copy of the Bates Wells 'report'. SMBC therefore does not hold the report and is unable to provide it in response to this request.

Right of appeal

53. 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

54. 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.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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